

A

TREATISE OF THE LAW

Merchant Ships and Seamen.

IN FIVE PARTS:

- I.—OF THE OWNERS OF MERCHANT SHIPS.
 - II.—OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS, AND THE CONVEYANCE OF PASSENGERS THEREIN.
 - III.—OF COLLISION.
 - IV.—OF THE CARRIAGE OF GOODS IN MERCHANT SHIPS.
 - V.—OF THE WAGES OF MERCHANT SEAMEN.
-

BY CHARLES, LORD TENTERDEN,

LATE CHIEF JUSTICE OF ENGLAND.

The Sixth Edition,

BY WILLIAM SHEE,

SERJEANT AT LAW.

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TO THE RIGHT HONORABLE^r
JOHN HENRY, LORD TENTERDEN,
BARON TENTERDEN, OF HENDON,
IN THE COUNTY OF MIDDLESEX,

THIS EDITION

OF THE

TREATISE OF THE LAW

OF

MERCHANT SHIPS AND SEAMEN,

IS, (WITH PERMISSION) INSCRIBED

BY

HIS MUCH OBLIGED SERVANT,

WILLIAM SHEE.

ADVERTISEMENT TO THIS EDITION.

IN presenting this Sixth Edition of Lord *Tenterden's* Treatise on the Law of Merchant Ships and Seamen to the profession, some explanation of the manner in which I have attempted to execute it may reasonably be expected from me.

The alterations which have taken place in the Statute Law, and the great number of cases decided since the publication of the last edition, have rendered corresponding changes in the text, and some increase in the size of the work unavoidable. My constant endeavour has been to preserve the design and the arrangement of the original author. Retaining the very words in which the general principles of the law were laid down in former editions, I have sought to apply and illustrate those principles, by what seemed to me, apposite references to recent decisions, employing almost always for that purpose, the language of learned Judges, and often of Lord *Tenterden* himself.

Where it has been impossible to observe this method, a little attention on the part of the reader will protect him from the inconvenience of mistaking, what is now for the first time printed, for the work of the late Chief Justice. All that has been added by me, is preceded and followed by a mark §. Referring, as such new matter generally does, to recent decisions, or recent Acts of Parliament, that precaution was scarcely necessary. Those who

are familiar with the last edition, may remember that neither the language nor the name of any Judge who sat on the bench after Lord *Ellenborough's* resignation, are to be found in it. I have thought that the judgments of Lord *Tenterden*, of his colleagues and successors, might properly be introduced by me, as those of Lord *Mansfield*, Lord *Kenyon*, Lord *Ellenborough*, and Lord *Stowell* were in the earlier editions of the work. It is rarely possible, by a mere abstract, to do justice to judicial decisions in which the doctrines of the Civil and Maritime Law, as modified by the Statute and Common Law of this country are expounded and applied. I was anxious to impair as little as possible, the authority of the text, and with that view, have sometimes thought it better to transcribe from the judgments of the Courts, passages which might suffer by abridgment, and which no alteration could improve.

To the Chapters on Collision, and the Conveyance of Passengers, to a great part of those on the Owners of Ships, on the Behaviour of Master and Mariners, Conveyance by a General Ship, Demurrage, and the Dissolution of Contracts, the reader will extend no more confidence than the authorities therein cited may appear to warrant.

In the works of modern European writers with which I am acquainted, I have not found much, that could usefully be added, to Lord *Tenterden's* exposition in this Treatise, of the Maritime Laws of Foreign Nations. For the Law of the United States of America, where a knowledge of it appeared likely to interest, or be useful to an English reader, occasional reference has been made to Mr. Justice *Story's* Notes to the American Edition of this work, the Commentaries of Chancellor *Kent*, and, under the guidance of those learned Judges, to the American Reports.

The Statutes now in force relating to the subject of this

Treatise, and a few additional forms of practical utility are inserted in the Appendix. In the Addenda will be found two important cases decided in the Court of Exchequer, and which have not yet been reported. (*a*)

To the anonymous author of the articles on Mercantile Law, in the *Law Magazine*, to which I have frequently had recourse, and always with advantage, I am anxious to express my acknowledgments. Much valuable matter would, I fear, have escaped my attention, but for his previous learning and research.

It were too long to acknowledge my obligations to my friends in the profession, from whose kindness I have received assistance. I have endeavoured to employ it usefully, and shall be much gratified, if I should not in their opinion, have altogether failed.

THE EDITOR.

(*a*) *Arthur v. Barton*, on the authority of the master of the ship to bind the owners for money borrowed by him in England, and *Lucey v. Ingram*, on the construction of the General Pilot Act.

PREFACE

TO THE FIRST EDITION.



CONSIDERING the great importance of every branch of law relating to Maritime Commerce, it is a matter of surprise that no treatise on the subjects discussed in the following sheets should have been written by any member of the profession of the law for a very long period of years. It is now more than a century since the first publication of the work of *Molloy*, the only *English Lawyer*, who has written on these matters. During that period the law of the country has grown up with its commerce ; many interesting points have been argued by able and eloquent Advocates, and decided by learned and enlightened Judges ; and some very important regulations have been introduced by the Legislature : but very little of useful addition has been made to the collection of *Molloy*, either by the subsequent editors of his treatise, or by the other authors, who have written on the same topics. Yet the absence of a general and established code of Maritime Law, which almost every other European nation possesses, seems to render a collection of the principal points of that law peculiarly necessary both for English merchants and English lawyers. On the subject of Insurance, this has been already effected. In the present Treatise an attempt is made to supply

the defect in some other branches. And in order to render the work as generally useful as the nature of it will allow, great care has been taken to avoid the use of technical phrases, wherever the form and manner of legal proceedings are not the principal points of consideration. The reader, who is of the profession of the law, may, I fear, sometimes be disgusted at this ; and at other times censure the awkward expressions substituted for the language, to which his ear is familiar. The only excuse that can be offered for the latter fault, is the difficulty of expressing ideas to which the mind is habituated, in any other words than those to which we are accustomed: a difficulty, of which the conversation of all persons, who are engaged in any art or science furnishes daily experience.

The treatise now offered to the public is compiled, not only from the text writers of our own Nation, and the reporters of the decisions of our own Courts, but also from the books of the Civil Law, and from such of the maritime laws of foreign nations, and the works of foreign writers, as I have been able to obtain a knowledge of. A few decisions of the House of Lords are quoted from the printed statements delivered by the contending parties and the Journals of the House. Some judgments pronounced by English Judges are also introduced, which have not hitherto been made public; for the most valuable part of these I am indebted to Mr. *Justice Lawrence*, and particularly for the cases of *Parish* and *Crawford*, *Appieby* and *Pollock*, and *Day* and *Searle*: the case of *Mackrell* against *Simond* and *Hankey* was communicated to me by the late Mr. *Justice Buller*, who, when at the bar, argued it on behalf of the defendants; the rest are cited from notes taken by myself or my professional friends. Indeed I am indebted to my friends not only for assistance of this kind, but also for the loan of scarce books, the correction of some errors,

and the suggestion of many valuable hints for the improvement of the work. Of the assistance thus afforded me I shall ever entertain the most grateful remembrance, and my reader will experience the advantage in many parts of this book.

The Ordinances most frequently quoted are those of Oleron and Wisbuy, the two Ordinances of the Hanse-Towns, and the *Ordonnance de la Marine du Mois d'Aoust 1681*. The Ordinances of Oleron and Wisbuy and the first Hanseatic Ordinance are in the hands of every lawyer: and whenever the Hanseatic Ordinance is mentioned generally, the reader will understand this to be spoken of. The Hanseatic Ordinance of the year 1614 was published with a Latin translation and commentary by *Kuricke* in a small quarto at Hamburgh in the year 1677. This book is very scarce in this country: the Ordinance itself is arranged and divided, and contains some additional regulations; which however are little more than a detail of the principles comprised in the first Ordinance. Reference is also occasionally made to such other foreign Ordinances as are to be found in the second volume of *Magens's* Essay on Insurances. I have often lamented my inability to consult the earliest maritime code of modern Europe, the *Consolato del Mare*. There is an old French translation of this body of laws, but I could never meet with it, and I am ignorant of the Spanish and Italian languages. Whenever therefore I have referred to this code, the reference is taken from the work of some other author; and it is made for the purpose of giving an opportunity of consulting the original to those, whose superior attainments enable them so to do. The Ordinance of Louis the Fourteenth is quoted from the edition published with a most learned and valuable commentary by *Valin*, in two volumes quarto, at Rochelle, in the year 1766, and is cited by the name of the French Ordinance. An English translation of

the whole of this Ordinance is contained in a book called "A general Treatise of the Dominion of the Sea, and a complete Body of Sea Laws," published in quarto, in the early part of the last century. The translation is divided into sections, and not like the French of *Valin*, into books and titles; but the subjects and articles of the sections in the English are the same as those of the titles in the French; and as the latter are always cited in the notes to this treatise, recourse may be had to the English translation with very little difficulty. If the reader should be offended at the frequent references to this Ordinance, I must request him to recollect that those references are made to the maritime code of a great commercial nation, which has attributed much of its national prosperity to that code; a code composed in the reign of a politic prince; under the auspices of a wise and enlightened minister; by laborious and learned persons, who selected the most valuable principles of all the maritime laws then existing; and which in matter, method, and style, is one of the most finished acts of legislation that ever was promulgated.

The writings of some foreign authors are also occasionally cited, particularly the *Notabilia* of *Roccus*, and the treatises of *Pothier* and *Emerigon*. The *Notabilia* of *Roccus* are an abstract of the most useful points contained in the works of earlier authors, and in the Digest and Code of *Justinian*. Where this author is cited generally, the reference is to the *Notabilia* de Navibus et Naulo. The treatises of *Pothier* are remarkable for the accuracy of the principles contained in them, the perspicuity of their arrangement, and the elegance of their style. The treatise of *Emerigon* is peculiarly valuable for its extent of learned research,

* The esteem in which this Ordinance has been held in France, is abundantly shewn by the little alteration that is made in the Code de Commerce of the year 1807.

and the numerous and apt citations of the texts of the Civil Law, and of the Maritime Ordinances, the opinions of former writers, and the adjudications of the Courts of Justice of his own country, which are to be found in every part of it.

It should be observed, however, not only of all these treatises, but also of the Civil Law, and the Ordinances, without excepting even the Ordinance of *Oleron* (which being considered as the edict of an English Prince, has been received with peculiar attention in the Court of Admiralty), that they have not the binding force or authority of law in this country; and that they are here quoted, sometimes to illustrate principles generally admitted and received, sometimes to shew the opinion of learned persons, and the rule adopted in maritime nations upon points not hitherto settled by the authority of our own law; and at other times to furnish information that may be useful in our commercial intercourse with foreign states.

In the composition of this treatise, my object has been rather to arrange and illustrate principles, than to collect the decisions of Courts or the Acts of the Legislature. The cases therefore are, with few exceptions, stated in a concise manner; and the clauses of Acts of Parliament are abridged, whenever an abridgment seemed likely to be as satisfactory to the reader as a transcript. Of the institutions of written law, the precise words are often necessary to a right understanding of the intention of the lawgiver. I should have saved myself much both of time and labour, if I had copied more and abridged less.

There are few reported decisions of our Courts of Justice from which some useful principle may not be extracted, and I have therefore searched the books of reports with much assiduity. Nevertheless, I am apprehensive that some valuable cases may have escaped my attention, and I shall feel myself greatly indebted

to any one, who will point out to me such omissions of this kind as may fall under his notice, or acquaint me with any other defects or errors that he may observe.

Relying on the kindness of those who may peruse the book with a friendly disposition to its author, and the candour of those who may look into it for the sake of information alone, I now offer it to the public, and to the profession of which I am a member, with a sincere desire that it may be found useful to both.

C. ABBOTT.

*Inner Temple,
January 25, 1802.*

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		— v. Fewson	-	193
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Arthur v. Barton, Addend. 597.
 Lucey v. Ingram, Addend. 599.

ERRATA.

- Page 44. To the case of *Fenton v. Dublin Steam Packet Company*, add note (m), referring to 1 Perry and Davison, 103
- Page 85, note (f), for "instructions suivre," read "instructions à suivre."
- Page 102, note (a), for "c'après," read "çi après;" for "navigé" read "navigué."
- Page 103, note (a), for "majistri" read "magistri."
- Page 127, note (s), for "infomartion" read "information."
- Page 152, note (r), for "Wiskelt," read "Weskett."
- Page 156, note (e), line 2, for "ingentum," read "ingentem."
- Page 214, note (o), for "Macpherson" read "Michenson."
- Page 217, note (c), for "Redie," read "Rodie."
- Page 232, note (e), for "2 Bing. 574," read "9 Bing. 574."
- Page 502, after "Baltimore" add note (l), referring to 2 Dods. Adm. Rep. 132.

THE LAW OF Merchant Ships and Seamen.

PART I.

CHAPTER THE FIRST.

OF THE OWNERS OF SHIPS IN GENERAL.

1. ONE or more persons may acquire the property of a Ship by building it at their expense, or by purchasing it of another, who has authority to dispose of it. Upon the death of the owner, his interest devolves upon his executors or administrators, his personal representatives. In the case of purchase, however, it is necessary that the person who takes upon him to sell should have power to do so: for although a sale of other goods by the person, who is in possession of them, does in many cases vest the property in the buyer, even when the seller himself has neither property in them, nor authority to dispose of them, the same cannot take place with respect to ships, as there is no open market for the sale of them. Indeed this species of property appears from very early times to have been evidenced by written documents, and at present always is so, which other moveable goods rarely are; and therefore the buyer has in this instance the means of ascertaining the title of any person, who offers to sell, and can seldom be deceived, except by his own fault.

2. The master of a ship possesses, as more fully appears in different parts of this Treatise, every power necessary for the employment and navigation of the ship; but he has not, unless in a case of extreme necessity, authority to sell the ship, and he is bound seriously and deliberately to try every other expedient to raise money, before disposing of the ship or any part of the

cargo (a). And with a view probably to prevent the opportunity of fraud, which the allowance of this power to him might afford, several of the foreign (b) ordinances expressly declare, that he shall not sell the ship without a special authority for that purpose from the owners; at the same time, however, authorizing him, in case of necessity, to borrow money upon the credit of the ship or its furniture, with the assent of his crew. And in conformity to these regulations, Sir *Matthew Hale*, when Chief Baron of the Exchequer, is reported to have decided upon a (c) case referred to, and argued before him, that the sale of a ship by the master did not convey the property to the buyer, although the sale was made in a foreign country, in a case of inevitable danger, the ship and tackle being beaten and broken, and no hope of saving any part of them, partly on account of the tempest, and partly on account of the barbarity of the inhabitants of the country, who carried off every thing that was cast on shore. Perhaps, however, there might in this case be some circumstances, not noticed by the reporter, which might lead the learned Judge to doubt the absolute necessity of a sale, or to think the buyer a party to the misconduct mentioned in the book. In a case that came before the Court of King's Bench on the subject of hypothecation, Lord *Holt* is reported to have said, "The master has no authority to sell any part of the ship, and his sale transfers no property; but he may hypothecate" (d). And in a subsequent case (e), wherein Lord Chancellor *Cowper* decreed that the *East India Company* should pay to the owner of a ship purchased of the master at *Batavia* for their use by one of their agents, the difference between the real value and the sum paid to the master, with interest thereupon at the rate allowed in *India* (which decree was afterwards affirmed by the House of Lords,) his Lordship took notice that the sale of the ship was not necessary: The transaction indeed was a gross fraud between the master and the agent of the Company, but without their privity. By the Consolato del Mare, the master is allowed to sell the ship, if

(a) *Underwood v. Robertson*, 4 Camp. 138.

(b) Consolato, D. M. ch. 253. Laws of Oleron, art. 1; of Wisbuy, art. 13; of the Hanse Towns, art. 57. French Ordinance, liv. 2, tit. 1. Du Capitaine, art. 19. Ordinance of Rotterdam, art.

165. 2 Magens, 107.

(c) *Tremenhere v. Tresillian*, 1 Sid. 452.

(d) *Johnson v. Shippen*, 2 Lord Raym. 984.

(e) *Ekins v. East India Company*, 1 P. Wms. 395. 2 Bro. Parl. Cases, 72.

worn out by age (*f*). And it is said by one of the earliest English reporters, that “the master of a ship may in some cases sell the ship, although it does not belong to him, as in the case of famine (*g*), &c.” This author does not cite the decision of any Court as an authority for the observation. The exception, however, of cases of extreme necessity rather fortifies than weakens the general rule; and no person can safely purchase a ship of the master in any case which does not clearly fall within the principle upon which the exception is founded; and such a case will rarely happen. And although the master be himself a part-owner of the ship, yet will his sale thereof be good for more than his own part; for the interest of part-owners is so far distinct, that one of them cannot dispose of the share of another; whereas in articles of ordinary sale, one partner may in general transfer the whole property, if the transaction be without fraud.

Since the publication of the first edition of this book, this power of the master has been a subject of judicial consideration in several Courts. The *British* ship *Glamorgan*, belonging to the port of *London*, was sent on a voyage from thence to *Antigua* and back; she delivered her cargo at *Antigua*, took in her homeward cargo, and sailed to *Tortola* to join convoy; and arriving at *Tortola* in a leaky state, on the 16th November, 1805, was there sold in the following month, under an order of the Vice-Admiralty Court, obtained on the application of the master for a survey, and a report of surveyors that the ship was totally unfit in her then state to proceed with her cargo, and that the expense of repairing her there would be more than her value when repaired. The purchaser procured a new register for the ship at *Tortola*, and sent her from thence to *Nevis*, and there procured another new register, and sent her from thence to *Grenada*, where she took in a cargo, with which she arrived safely in *London* in July 1806. No fraud was found to exist in this sale, and the Court being of opinion that the sale could not be sustained under the authority of the Vice-Admiralty Court, it became material to consider whether it could be sustained as a sale by the authority of the master. The Court appear to have thought that it could not; but the point was not judicially decided, because the learned Judges were of opinion that, supposing the master was warranted

(*f*) Cap. 253.

(*g*) Jenkin's Centuries, p. 165.—Observation at the end of case 17.

by an authority, express or implied, from his owner, to sell the ship in such a case, still it was necessary that the forms prescribed by the Register Acts should be complied with: and nothing of this sort having been done, the original owner succeeded in his action against the purchaser (*h*).

The *American* ship *Fanny and Elmira* (*i*) having been taken by the *Danes*, and recaptured by a *British* sloop, was claimed in the Prize Court of Admiralty on behalf of her original owners, who resided at *New York*, and also by a Mr. *Ormsby*, who had purchased her of the master at *Sligo* in *Ireland*, under the following circumstances. The ship having been damaged upon the rocks in *Sligo Bay*, the master caused her to be surveyed by persons whom he described as competent, but who do not appear to have filled any public station, and who reported that it would require 1500*l.* to repair the vessel, a sum far exceeding her value, and that it would be for the interest of the concerned to have her sold. She was accordingly sold by public auction, and bought by *Ormsby* for 350*l.*, who, by the master's desire, paid part of the money into the hands of the agents of the owner at *Sligo*, and carried the remainder to account between himself and the master. Soon after this purchase, *Ormsby* offered a fourth of the vessel to the master at the same price, provided he would consent to navigate her again as master; this he agreed to; the vessel was repaired at an expense of 800*l.*, sailed to *Riga*, and was taken on her return from thence to *London*. The agents of the original owners declared they had done every thing in their power to prevent the sale, and had been ready to make any advances that might be found necessary. The learned Judge of the Court ordered the ship to be restored to the original owners, without prejudice to any rights which the proper Court of Justice in *America* might think Mr. *Ormsby* had acquired by the purchase. It is obvious, from the facts above stated, that this sale could not be justified on the ground of necessity. But the opinion of so very learned and enlightened a Judge on this subject in general, deserves the greatest attention, and ought to be made known as generally as possible, to prevent sales of this kind, which are so

(*A*) Reid v. Darby, 10 East, 143. See also as to the authority of the Vice-Admiralty Court, to order a sale on the application of the master, Hunter v.

Prinsep and Others, 10 East, 378.

(*i*) The *Fanny and Elmira*, Hicks. Edw. Ad. Rep. 117.

often injurious to the rights of the owners. "In the first place," he says, "it must be shewn that there was a necessity, and then it remains to be considered whether it was such as by law would give the master a right to sell. That such a case may arise, I am not prepared to deny; suppose, for instance, a ship in a foreign country, where there is no correspondent of the owners, and no money to be had on hypothecation to put her into repair. Under these circumstances, what is to be done? the ship may rot before the master can hear from his owners; and therefore, if the necessity were clearly shewn, with full proof that every thing was done *optimâ fide*, and for the real benefit of the owners, the Court might be disposed to sustain a purchase so made." And again, "In a case of that description, I say, strongly put, where there was no ground for suspicion, although I do not know that such a power is given to the master by the general Maritime Law, yet, feeling its expediency, this Court would strain hard to support the title of the purchaser: but there must be the clearest proof of the necessity: it must be shewn not only that the vessel was in want of repair, but likewise that it was impossible to procure the money for that purpose."

Again, in an action brought on a policy of insurance on the ship *Lady Banks*, which had been sold by the master at the *Isle of France*, the jury having, in answer to the questions submitted to their consideration by the learned Judge at the trial, found, first, that the master appeared to have acted according to the best of his judgment; secondly, that the sale was conducted fairly and honestly; and thirdly, that there was *no* necessity for the sale of the ship; the verdict was entered for the assured for an average loss only, and not for a total loss with benefit of salvage, which the assured had claimed (*k*).

It may be proper to mention in this place a case tried very soon after that which I have last cited, arising out of a sale of a part of the cargo made at the *Cape of Good Hope* by the master of a ship which had been wrecked there. The authority of the master to sell the cargo depends upon the same principles as his

(*k*) *Macburn v. Leckie*, tried before Lord Chief Justice Dallas, March 5th, 1822. A printed report of this trial has been published, by order of the committee for managing the affairs of Lloyd's. The owners of part of the goods, shipped on

board the *Lady Banks*, afterwards recovered from the plaintiffs in this cause, in an action for breach of duty, for not delivering at their place of destination. 1 Bing. 243.

authority to sell the ship. The goods in question were forty-two chests of indigo, which the purchasers sent to *England*, and which were found upon arrival here to be damaged. Several other chests which were on board were also saved and sold. The catalogue for sale described several of the packages of the indigo as being wet, but otherwise in good order, the chests were not opened before the sale. The master, acting under the advice given him at the *Cape*, thought a sale the best thing that could be done for all concerned, and no fraud or improper motive was imputed to him. The action was brought by the owner of the forty-two chests, nominally against the *East India Company*, virtually against the persons who had become the purchasers at the *Cape*. The sale of these goods under these circumstances being thought *unnecessary*, the plaintiffs obtained a verdict. A motion for a new trial was made in the ensuing term, but no rule granted (l).

§ The decision of these two cases is conformable to the opinion of the Court of King's Bench, in the case of the *Royal Assurance Company v. Idle*, which was a writ of error brought on a judgment of the Court of Common Pleas (m).

This was covenant on a policy of assurance on freight and goods effected in the name of the plaintiff, and sealed with the common seal of the defendants. The jury found that there had been a partial loss as to the cargo, and a total loss upon the freight, and gave their verdict for the plaintiff, with damages for such total loss on freight, subject to the opinion of the Court upon a case of which the following is the substance:—

The ship set sail from *Quebec* to *London*, being her port of discharge in the United Kingdom, and on her voyage down the river *St. Lawrence* having, by an unavoidable accident, struck the ground, she immediately sprung a leak. Tempestuous weather came on, and after every endeavour had been used to get the vessel into a place of safety, and when all the crew, with a number of men who had been procured from the shore to assist them, were exhausted by working at the pumps, and when there were six feet of water in the hold and the water still gaining fast upon the crew, it became absolutely necessary, for the preservation of the lives of the master and crew, to run the vessel on shore; and

(l) *Freeman v. East India Company*, tried before Lord Tenterden, April 17th, 1822. A printed account of this trial also was published with *Maeburn v. Leckie*.

The motion for a new trial is reported in 5 Barn. & Ald. 617.

(m) 3 Brod. & Bing. 151.

on the 21st November she was accordingly run ashore in *Kamouraska Bay*, about ninety miles below *Quebec*. She took the ground upon the outside of a reef of rocks at the entrance of the bay, and the ship being situate in the tide way, and immoveable, was there exposed to the full force of the River *St. Lawrence*, and in the way of the drift in floating down the same, which was then beginning to form in great masses.

On the 22nd November the master went to *Quebec* and acquainted two of the owners, resident there, with his misfortune, and after his return caused two surveys to be made of the ship by persons of competent experience and skill; and it being the opinion of the surveyors, that she lay in a situation of imminent peril of being carried away and destroyed by the ice; and that it was prudent, and for the benefit of all concerned, to sell her and her cargo as soon as possible; he accordingly, under the direction of a part-owner of the ship and cargo, and agent at *Quebec*, for the owners thereof, did proceed to a sale of the ship and cargo by public auction at *Quebec*, at which sale the part-owner attended.

The jury found that the master had acted throughout the whole transaction fairly and *bonâ fide* for the benefit of all concerned; and that the sale was honestly, fairly, and properly conducted and directed with a view to the interest of all parties concerned.

The ship, contrary to all reasonable expectations, survived the winter of 1810, and in the spring of 1811 was, at a great expense, floated and carried up to *Quebec* by the purchasers thereof, and after being repaired at an expense of £546. 6s. 2d., currency, performed a voyage to *England* in the summer of 1811 and brought a full cargo.

The special case was afterwards turned into a special verdict, and upon the facts above stated the Court of Common Pleas held that the master was justified in making the sale (*n*); but the case being afterwards brought by writ of error before the Court of King's Bench, that Court called on the Counsel for the defendants in error to point out how it appeared by the special verdict that the sale was necessary, and after hearing some observations from him to show that the necessity was to be inferred from the finding of the jury, expressed a clear opinion that the necessity did not appear, and awarded a *venire de novo* for the purpose of trying whether it existed or not.

In the subsequent case of *Reid v. Bonham* (n), the jury having expressly found that the captain had a justifiable cause of selling the ship, the Court of Common Pleas refused to disturb the verdict, although the circumstances relied upon to shew the necessity of sale, were certainly much less urgent than those which the Court of King's Bench had in the previous case deemed insufficient. But one very learned judge differed from the rest of the Court, and wished the finding of the jury to be reconsidered.

"First," said Mr. Justice *Richardson*, "as to the necessity of sale, it is certain the assured has no right to sell except in a case of strong necessity; perhaps he is not confined to a case of physical necessity, but the necessity must be such as would induce a prudent man even uninsured to sell. What then was the necessity here? The captain contents himself with 1200*l.* when he had 12,000*l.* at stake, so that, if he had been uninsured, the loss must have been 10,800*l.*, with the exception of the amount for which the ship's stores might have sold; whereas, the loss would have amounted to no more than 5000*l.* if the ship had been repaired at that expense, and had completed her voyage. There was, it is true, some difficulty in raising money, *Calcutta* being an expensive, though a good place for repairs, and the captain attempted, without success, to borrow on hypothecation of the ship, but he never offered to hypothecate the cargo, as he ought to have done. It appears a strong thing to say, that he would have sold the ship for 1200*l.* if he had been uninsured. My Lord Chief Justice, and my learned brothers seem to think that the jury have concluded this point. That the captain acted honourably, there can be no doubt, but I should wish it to be again considered, whether he acted for the benefit of all concerned." This opinion of Mr. Justice *Richardson* is consistent with the principle of all the decisions above cited, and probably the case of *Reid v. Bonham* would now be considered as of slight authority (o).

(n) 3 Brod. & Bing. 147.

(o) The case of *Idle v. Royal Exchange Assurance Company*, was decided in the interval between the resignation of Chief Justice Gibbs and the promotion of Mr. Justice Richardson to the bench of the Court of Common Pleas. The case of *Miles v. Fletcher*, 1 Dougl., on which Chief Justice Dallas principally relies in

his judgment, is not cited in the previous editions of this work. The course pursued by the Court of King's Bench when *Idle v. The Royal Exchange Assurance Company* came before it in error, was mentioned in the argument of *Reid v. Bonham*, but not adverted to in the judgment of the Court.

In a more recent case, of *Robertson v. Clarke* (p), in which the Court of Common Pleas considered a sale by the captain justifiable, it appeared, that the ship having been so shattered in a storm, that the expense of repairing her would have exceeded her original value, was sold *bond fide* for the benefit of all concerned, and being brought by the purchasers to a place where she might have been completely repaired, had it been deemed advisable, was there broken up. Lord Gifford, C. J., in delivering the judgment of the Court, said, "This principle may be clearly laid down, that a sale can only be permitted in case of urgent necessity, that it must be *bond fide*; for the benefit of all concerned, and must be strictly watched. Nothing can now impeach the correctness of this principle, and the only question here is, did the evidence establish that urgent necessity? The jury have come to the conclusion that it did, and after hearing the notes of the learned judge who presided, I am of the same opinion. It is not disputed that the sale was *bond fide*; and it is clear that it was for the benefit of all concerned. I agree that it is not sufficient to shew that the sale was *bond fide*, and for the benefit of all concerned, unless it be also shewn that there was urgent necessity for its being resorted to, but that having been satisfactorily proved in the present instance, the verdict cannot be disturbed on that ground."

This doctrine, that necessity alone can justify the sale of a ship by its master, and sustain the title of a purchaser from him, is in strict conformity with the laws of other maritime nations. In *France*, the rule is, that the master cannot sell his ship without a special authority from his owners, unless it be so damaged, as to be no longer capable of navigation (q). In the *United States*, the decisions of our Courts have been maintained; and it has been held, that in cases of extreme necessity the master may sell in a foreign country, but not in the country where his owner lives (r).

What circumstances of distress or damage will constitute such a case of urgent necessity as may enable a master to convey to a purchaser an indefeasible title to his ship, it is more difficult to determine (s). A learned writer has cited with approval the rule

(p) *Robertson v. Clarke*, 1 Bing. 446.

R. 150.

(q) *Pardessus Cours de droit Commercial*, part 3, tit. 1.

(s) See the *Law Magazine*, No. 27, art. 3. *Mercantile Law*.

(r) *Scull v. Briddle*. 2 Wash. Cir.

suggested by Mr. Justice *Richardson*, when at the bar, in the case of *Reid v. Darby*. "So long as the subject matter which the master is entrusted to navigate continues as a ship, and capable of navigation with such repairs as are to be had, he cannot sell it; he can only sell the materials when it is broken up, or become a mere wreck." Cases may, perhaps, occur in which this rule would be considered too strict; but it is one to which all prudent purchasers will find it their interest to attend. §

In foreign countries, attempts have been made to evade the effects of these restrictions, by procuring a sentence of condemnation and sale of a ship as unfit for service, from some Court or judge having jurisdiction in maritime affairs. In *France*, such condemnation is required, and is deemed sufficient to protect the title of a *bonâ fide* purchaser, even when obtained by the fraud of the master, against whom the owners must seek their remedy (s).

§ Lord *Stowell*, in the case of the *Fanny and Elmira*, above cited, speaks of an appeal by the master to such a Court for authority to sell in terms of approval. "There is a very convenient practice, which obtains in the Courts of Vice-Admiralty in the *West Indies*, where the fact of distress being proved, the transaction is not left to the master, but a sale is ordered under the superintendence of the Court itself." And again, in the case of the *Warrior* (t), a cause of possession, in which he refused to restore to the real owner, a ship, which, after ineffectual attempts to obtain money for necessary repairs, was sold by the master under the order of the Vice-Admiralty Court of the *Mauritius*, the same learned judge observed, "What is the master to do? Common sense, as well as the law, points out that he should, in the first place, apply to the agent of the owner, which it appears he did. If the agent cannot or will not assist, and if himself and his owner are without any other friends who are ready to come forward and furnish him with the necessary supplies, what can be done better than make application to the Court of Admiralty?" (u) § But no such juris-

(s) Pardessus Cours de droit Commerciale, vol. 3, tit. "De l'acquisition des navires."

(t) 2 Dodson's Admiralty Reports, 288.

(u) The convenience of this practice may well be doubted from Valin's experience of its effects: "Un capitaine

ou maître ne s'avisoit pas de vendre son navire, mais quand il veut s'en défaire, il trouve aisément le secret de le faire condamner, du moins y en a-t-il assez d'exemples pour qu'on puisse penser sans jugement téméraire qu'il y a eu des navires condamnés qui ne méritaient pas de

diction is known to the law of *England*. The condemnations, as they are called, sometimes made abroad, upon the survey and report of captains or carpenters, have no binding force in this country, but the fact, upon which they profess to be founded, may be again litigated by the parties interested in disputing it. This was successfully done at a trial before the late Lord *Ellenborough*, in a case (v) of which it will be proper to detail the circumstances, as there is too much reason to fear that similar practices not unfrequently take place. The owners of the ship *Grace* sent her to *Jamaica*, under the command of one *Cook*, with a cargo consigned principally to *M^r Anuff* and *Cunningham*, and with orders to follow their directions in respect to his loading back, and to apply to them for money for the use of the ship. On the 23rd of *February*, 1802, after the discharge of her cargo, the ship was driven on shore at *Rio Bueno* in *Jamaica*, in a gale of wind. The master applied to *Cunningham*, who resided at *Montego Bay*, for advice in this emergency, and on the 27th *February*, made the usual protest. On the same day, the deputy naval officer at *Montego Bay* directed his warrant to four masters of ships, desiring them to examine the *Grace*, and make a return upon oath of her state and condition. They reported that they had been on board, and found the ship settled in a sand bank four feet, with a bank of sand between her and the sea of twice her length, and not more than two feet water on the sand bank; and that they were therefore unanimsly of opinion, from the great expense that would be incurred in attempting to get her afloat, and the little chance of succeeding therein, that it would be most for the advantage of the underwriters, and all others concerned, to sell the ship as she then lay, with all her materials, to the best bidder. *Cunningham* advertised the ship for sale by auction, as a wreck; he acted as auctioneer, and charged his commission, and she was sold on the 15th of *March*, to one *Dunn*, for 1210*l.* *Jamaica* currency, about 864*l.* sterling. One of the surveyors attended, and bid at the sale. *Dunn* sold the vessel to *Robert Moulton*, a brother of one of the defendants, who, upon his oath of ownership, and surrender of her register, obtained a new register at *Jamaica*, and trans-

l'être, mais quand il n'y a pas de preuve de la friponnerie il n'y a pas moyen de la punir.—Valin. Comm. sur l'Ordonnance, liv. 2, tit. 1, art. 19.

(v) *Hayman and Others v. Moulton and Others*, Sitt. at Guildhall, Nov. 1, 1803. There is a report of this case in 5 Esp. N. P. C. p. 65.

ferred her there to the three defendants, one of whom was one of the four masters by whom she had been surveyed. The vessel was got off the sand with considerable difficulty, but very little injured, and after some slight repairs returned to *England* with a cargo. The deputy naval officer here mentioned, is the deputy of an officer appointed by the governors of our colonies and plantations, to receive an account of ships and their cargoes upon their arrival there (*w*). The ship had cost 3700*l.* before she left *England*, and was little more than three years old.

The owners being dissatisfied with this sale, brought the present action to try its validity; and, at the trial, it appeared by the evidence of *Cook*, and of three of the masters who had surveyed her, that they had paid very little attention to the ship itself, which was never pumped before they made their report; but they swore that they thought a sale the most prudent step to be taken, on account of the difficulty, expense, and hazard of removing her from her situation, and the little resources that *Cook* had for such a purpose. The plaintiffs contended, that the master of a ship could not dispose of her in any case; or that, admitting him to have this power in a case of absolute necessity, such necessity did not exist in this instance, and the whole transaction was a gross fraud.

The Chief Justice, Lord *Ellenborough*, offered to reserve the question of the master's power to sell under *any* circumstances, for the consideration of the Court, if the verdict should render that point material; and stated his own opinion to the jury to be, that although the master had no general authority to sell, he had an implied authority, in cases of extreme necessity, to act for the benefit of the concern, exercising a sound discretion, such as the owner himself would exercise if he were upon the spot; and that in extreme cases, and extreme cases only, he had power to sell, as in the instance of a wreck which could not be got off, and ought not to be left to perish absolutely. And he desired the jury to consider, whether in this case there was such a necessity as would have induced the owner himself to sell if he had been present; and, if they thought there was such a necessity, then, whether the sale in this instance was fraudulent? The jury found a verdict for the plaintiffs.

In the course of the trial no regard was paid to the authority

of the deputy naval officer, whose situation certainly gives him no manner of jurisdiction on such a subject. In commenting upon the evidence, the Chief Justice adverted particularly to the circumstance of one of the surveyors having bid at the sale, and another become a purchaser before the ship left the island; and observed, that it might be a useful lesson to teach such persons, that by accepting the office of surveyor, they elected, not to become purchasers, or to derive any benefit from a sale.

And at a subsequent trial of an action (x), brought to recover the value of a ship, which had been in like manner condemned and sold at *Tobago*, as incapable of repair, and in which also the plaintiff succeeded, his Lordship said, that he considered a proceeding of this sort, not as the sentence of a Court pronounced for the captors of a captured vessel, but rather as the inquisition of a Sheriff, for the purpose of information to those, who under certain circumstances have the power of selling the ship. Such an inquisition is not conclusive upon the party whose property is in question.

In the case of the ship *Grace*, the sale was considered to be fraudulent; but in those of the ship *Glamorgan*, and the ship *Lady Banks*, which have been recently mentioned (y), the sale was thought to be fair and well intended, and the former was made under an order of the Court of Vice Admiralty of *Antigua*, founded on the proceedings usual on such occasions, viz., a petition of the master to the Court for a survey, a commission of a survey, report of surveyors, decree of the judge adopting the report, petition of the master for a sale, and a commission of sale directed to the Marshal of the Court. Yet in this case also, the Court of King's Bench decided, that the Vice-Admiralty Courts abroad have no authority to decree upon the mere petition of the master, the sale of a ship reported upon survey to be unseaworthy, and not repairable, so as to carry its cargo to the place of destination without an expense exceeding the value of the ship when repaired (z).

The (a) writers on Maritime Law inform us that if a ship be

(x) *Andrews v. Glover*, Sitt. after Trin. T. 46 Geo. 3, at Guildhall, before Lord Ellenborough, Chief Justice.

(y) *Ante*, page 5.

(z) *Reid v. Darby*, 10 East, 143.

(a) *Roccus*, not. 20. *Straccha de Navibus*, pars. 2, num. 12. *Molloy de Jure*,

m. and n. book 2, ch. 1, s. 8. The latter adds, that if a ship commit piracy, the boat is not forfeited; and refers to a case in *Rolls. Ab.* for his authority; and *Beawes* has followed the words of *Molloy*. But in the case referred to, the boat is not mentioned.

sold with the tackle, apparel, furniture, and other instruments thereto belonging, the ship's *boat* is not conveyed by these words, and they found their opinion upon the authority of those parts of the Digest in which it is said that the *boat* is not a part of the ship (*b*), or of its apparel (*c*).

3. It has been observed that the property of a ship is now always evidenced by written documents. And these documents not only furnish the owner with proof of his property, but also enable him to dispose of it when the ship is at sea, or in a foreign port. When a ship is here in the country of its owner, and a delivery of actual possession is possible, such delivery is necessary to give a perfect title to the buyer in case of a sale of the whole ship; for although, as between buyer and seller, the sale may be completed by payment of the price without delivery of possession, yet if an execution issue upon a judgment against the seller, the sale may be deemed fraudulent and void as against the party who obtained the judgment (*d*). If again, the buyer suffer the seller to remain in possession and act as owner, and the seller become bankrupt before the buyer takes possession, the property may be considered under the bankrupt act, as remaining in him, to be disposed of for the benefit of his creditors (*e*). But if the buyer having suffered the seller to remain in possession does, after a time, take possession of her, and the seller then becomes bankrupt, this will not come within the statute, possession having been taken before the bankruptcy (*f*).

§ The title also of mortgagees and trustees for sale of ships for the payment of debts, was, before the passing of the Registry Acts, 4 Geo. 4, c. 41, and 6 Geo. 4, c. 110 (*g*), liable to be defeated by the bankruptcy of the original owner and mortgagor or assignor of the ship continuing in possession. The real ownership was considered to be in the mortgagee, while the apparent ownership,

(*b*) Dig. 21, 2, 44.

(*c*) Dig. 6, 3, 1. See the case of the *Dundee*. 1 Hagg. A. R. 109.

(*d*) By the common law and the stat. 13 Eliz. c. 5. *Robinson v. McDonnell*, 2 B. & A. 134.

(*e*) By virtue of the stat. 6 Geo. 4, c. 16, s. 70, and former statutes in *Monkhouse and Others v. Hay and Others*, 2 Brod. & Bing. 114. *Hay v. Fairbairn*, 2 B. & A. 193. *Robinson v. McDonnell*, 5 M. & S. 228. *Kirkley v. Hodgson*, 1 B. & C. 688. *Philpot v. Williams*, 2 Eden. 231. With respect to an un-

finished ship appropriated by payment of instalments by the purchaser, while still unfinished, but continuing in the hands of the builder at the time of his bankruptcy, see *Clarke v. Spence*, 4 Ad. & Ell. 448; where a ship so circumstanced was held not to be within the order and disposition of the bankrupt with the consent of the owner, and therefore not to pass to his assignees.

(*f*) *Robinson v. McDonnell*, 2 B. & A. 134.

(*g*) 3 & 4 Wm. 4, c. 55, s. 42.

as well as the order and disposition of the ship, remained in the bankrupt, to whose assignees, under the 21 Jac. 1, c. 19, the property was in several cases adjudged to pass. For remedy of this inconvenience it was enacted, "That when any transfer of any ship or vessel, or of any share or shares thereof shall be made only as a security for the payment of a debt or debts, or by way of mortgage or of assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and comptroller of the port where the ship or vessel is registered, shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry in manner hereinbefore directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect. And the person or persons to whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or as trustee or trustees only, shall not, by reason thereof, be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer, be deemed, by reason thereof, to have ceased to be an owner or owners of such ship or vessel any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred available by sale, or otherwise for the payment of the debt or debts for securing the payment of which such transfer shall have been made" (g).

"And that when any transfer of any ship or vessel, or of any share or shares thereof shall have been made as a security for the payment of any debt or debts either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid, shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupts as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof,

so by him or them mortgaged or assigned as aforesaid; but that such mortgage or assignment shall take place of and be preferred to any right, claim, or interest, which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding" (*h*).

These enactments are incorporated into the General Bankrupt Act (6 Geo. 4, c. 16, s. 72). They are conceived in a spirit of just consideration for the respective rights of the mortgagees of ships and the creditors of bankrupt ship-owners. The claim of the mortgagee is not preferred to that of the general creditors, unless he has taken care, on lending his money, that his debt and security shall appear in the book of registry and on the back of the certificate. Nor is this preference any hardship on the creditors. Had they taken the easy precaution of referring to the document on which the incumbrance to be available against them must appear, they had not been misled by the possession and reputed ownership of the bankrupt. §

In the case of a sale or agreement for sale of a part only, it is thought sufficient, if the vendor, having delivered the muniments of his title, ceased from the time to act as a part-owner, actual delivery of a part being said to be impossible (*i*). This, however, should be understood with some limitation: for if a part-owner has the *actual* possession of the ship, it is not impossible for him to deliver the possession: if he has not the actual possession, the possession of the other part-owners may reasonably be considered to be the possession of the vendee after the sale. But when a ship is abroad, a perfect transfer of the property may, at the Common Law, be made by assignment of the Grand Bill of Sale, and delivery of that and the other documents relating to the ship (*j*), as the delivery of the key of a warehouse to the buyer of goods contained therein is held to change the property of the goods, according to the rule of the Civil Law (*k*); such delivery in each case being not merely a symbol, but the mode of enabling the buyer to take actual possession, as soon as circumstances will permit. And the Legislature has recognized this mode of

(*h*) 3 & 4 Wm. 4, c. 55, s. 43.

(*i*) *Addis v. Baker and Others*, 1 Anst. 222. See also *Gillespie v. Coutts*, Amb. 652.

(*j*) *Ex parte Matthews*, 2 Ves. 272, and *Atkinson v. Maling*, 2 Ter. Rep. in

K. B. 462. *Ex parte Batson, Co. Bank. Laws*, ch. 8, s. 11. 3 Bro. Ch. Ca. 362, and per Kenyon, Ch. J., *arguendo* in *Gordon v. East India Company*, 7 Term Rep. in K. B. 234.

(*k*) Dig. 41, 1, 9, 6.

transfer, and introduced particular regulations respecting it, as will be noticed in the following chapter. And to this purpose, in the case *ex parte Batson* (*h*), *Dublin* was esteemed a foreign port with respect to a ship belonging to owners resident in *England*, and mortgaged there. In such a case, however, the buyer should not delay to take possession of the ship upon its return to this country.

The law of England, which in all its branches favours the transmutation of property made without fraud, as considering such transmutation beneficial to commerce, differs in this particular very materially from the law of *France*; for by the *French* ordinance (*i*), all ships remain subject to the debts of the seller, until they have made one voyage at sea, under the name and at the risk of the new purchaser, unless they have been sold under a decree: and the sale of a ship at sea shall never prejudice the creditors of the seller. And *Valin*, in his commentary on this part of the ordinance, says, that the debts here meant are debts of every description due at the time of the sale: and in another place (*j*) he informs us, that according to the general law of *France*, ships, like other moveables, cannot be hypothecated; and that in those parts of *France* where the hypothecation of moveables is permitted, the hypothecation continues in force only during the possession of the debtor himself, and does not enable the creditor to follow the property into the hands of a third person. It should be observed, that in the case of hypothecation, according to the strict meaning of that word in the Civil Law (*k*), the debtor always continues in possession of the thing hypothecated.

4. Another mode of acquiring property in a ship is by capture from an enemy in time of war, legalized and sanctioned by a sentence of condemnation in a Court of the capturing power, constituted according to the law of nations. In this case, however, if the capture is made by a ship belonging to his Majesty, the prize is formally condemned to the King, and the value distributed among the captors; and if the capture is made by a private ship, in which case the sentence is in form a con-

(*h*) *Ex parte Batson*, Co. Bank. Laws, tom. 1, p. 340.
ch. 8, s. 11.

(*i*) Liv. 2, Tit. 10. Des Navires, art. 2 & 3.

(*j*) Com. on the French Ordinance,

(*k*) Dig. 13, 7, 9, 2. *Proprie pignus dicimus, quod ad creditorem transit; hypothecam, eum non transit, nec possessio ad creditorem.*

demnation to the captors, a sale will always be the most convenient mode of ascertaining the value, both for the purpose of distribution among the captors, and of payment of the (*l*) duties to the King; and the Acts of Parliament which give to prizes the privileges of *British* ships, presume a sale thereof, and provide regulations accordingly, as will appear in the next chapter.

There appears to be no settled and uniform rule established in practice among nations as to the precise period at which property is divested by capture. By some writers and in some nations this has been held to take place after a possession of twenty-four hours; by others not until the prize has been carried *infra præsidia* (*m*), an expression of very doubtful meaning as applied to maritime warfare. Lord *Stowell* has said, that, in his apprehension, "by the general practice of the law of nations, a sentence of condemnation is at present deemed generally necessary, and that a neutral purchaser in Europe during war looks to the legal sentence of condemnation as one of the title deeds of a ship, if he buys a prize vessel" (*n*). Such a sentence was thought necessary in this country to divest the title of the original owner, and give a valid title to a purchaser under captors more than a century ago; and a ship taken from an Englishman by a *French* squadron in the year 1691, and sent into *Bergen* in *Norway*, and there sold, coming afterwards into this country, was claimed by the original owner, and decreed to be restored to him by a sentence of the Court of Admiralty, affirmed afterwards upon appeal to the delegates (*o*). And upon the ground, that a legal sentence of condemnation cannot, according to the law of nations, be pronounced by a consul or minister of the belligerent power, in the country of a neutral power, to which the prize may have been taken; ships have been restored by the judgment of the Court of Admiralty to their original owners, as well upon recapture from the purchaser (*p*), as upon arrest in a port of this country (*q*). In one case, the ship, while in the hands of a neutral purchaser, had been taken by the *French*, and carried into a *Spanish* port, and there condemned by the *French* consul

(*l*) By 34 Geo. 3, c. 70, ships of war, whether public or private, captured and made prize, are exempt from duty.

(*m*) March, 110. See Vattel, b. 3, c. 13.

(*n*) 1 Rob. A. R. 139.

(*o*) The ship *Constant Mary*, 3 Rob.

A. R. 97, note. *Thermolin v. Sands*, Carth. 423.

(*p*) *The Flad-Oyen*, Martinson, 1 Rob. A. R. 135.

(*q*) *The Kierlighett*, Spöerewig, 3 Rob. A. R. 96. And the *Prosperous*, Dec. 1800.

as prize, but that condemnation had been reversed on appeal to the superior prize court at *Paris*, and the ship restored to the purchaser. These facts, however, were held not to alter the case, or give validity to the title of the purchaser.

§ When this practice of condemnation in a neutral port, by the consul of a belligerent state, was first challenged in the Court of Admiralty of *England*, in the case of the *Flad-Oyen*, it was treated by Lord *Stowell* as a pretension altogether without authority: "I must deem," he said, "the act of this *French* Consul, a licentious attempt to exercise the rights of war within the bosom of a neutral country." Lord *Kenyon*, in the Court of King's Bench, a few months after, emphatically approved of this decision, and said, that "the case had been determined on grounds, which would recommend it to all who filled judicial situations" (t). In the *United States* also, it has been held that the exercise of such a jurisdiction is inconsistent with the law of nations (u).

The principle upon which these decisions were founded is, that a sentence of condemnation as prize of war, is a judgment *in rem*; the result of legal proceedings in a legitimate Court, armed with competent authority upon the subject matter, and over the parties concerned, a Court which has the means of pursuing the proper inquiry, and enforcing its decision by reason of its possession of the *res ipsa*, the *corpus*, which is the subject-matter of it.

According to this principle, a ship, carried into a neutral port, ought not, while remaining there, to be condemned *in the country of the captors*; and in the cases of the *Flad-Oyen* and the *Hersteldef* (v), Lord *Stowell* was of opinion that such a practice was not authorised by the law of nations. In the last cited case, having learnt that a *Dutch* ship, condemned by him, and which was described as lying at *Plymouth*, had been taken on capture to a port in *Norway*, and lay there at the time of adjudication, he declared that "the Court would not condemn a vessel lying in a neutral port;" and directed the registrar to amend the decree. "Upon principle," said the same learned Judge, "in the subsequent case of the *Henrich and Maria* (w), which was that of a *British* ship carried into *Norway* by a *Dutch* privateer, and

(t) *Havelock v. Rockwood*, 8 Term Rep. 268. *Donaldson v. Thompson*, 1 Camp. 429.

(u) American edition, in notis, p. 17.

(v) 1 Rob. A. R. 113.

(w) 4 Rob. A. R. 34.

condemned by a Court at the *Hague*; it is not to be asserted that a ship brought into a neutral port is with effect proceeded against, in the belligerent country." But having been satisfied that the High Court of Admiralty of *England* had condemned, as prize, ships lying at *Leghorn* and *Lisbon*, when the Sovereigns of those ports were not engaged in a common war against the enemy of this country, and had also issued commissions to other neutral ports for the examination of prisoners of war carried into them, he added, "I am of opinion that this Court is bound against the true principle, by the practice which it has not only admitted but applied." The observation of *Bynkershoek*, "*In jure belli quod quis sibi sumit hostibus tribuendum est*," a rule true in all instances, is not more true in any instance, than in one, in which the rights and interests of other countries, being neutral, are so directly concerned. How far the superior court may consider that question as concluded by the practice, even an inveterate practice of this Court, is more than I can say; but sitting here and observing, as I am judicially bound to do, the course of judicial administration which has prevailed, I do not feel myself authorized to uphold the sentences which have passed in this Court, over prizes carried into Foreign Ports, and disallow, at the same time, the validity of such as the enemy has pronounced, under circumstances so nearly similar as not to afford ground of a distinction between them, which appears to my judgment sufficiently solid." In the cases of the *Comet* (x) and the *Victoria* (y), Lord *Stowell* adhered to this decision.

The case of the *Henrich and Maria* was affirmed by the Lords of Appeal, and the judgment pronounced by Sir *William Grant* (z) proceeds upon the ground, that the practice of *Great Britain* must have the effect of making those sentences valid, and that there was no equity on which we could deny the validity of that title to neutrals purchasing of the enemy, at the same time that they were invited to take it from ourselves. (a)

The doctrine thus sanctioned by the practice of *France*, *Spain*,

(x) 5 Rob. A. R. 285.

(y) Ed. A. R. 97.

(z) 6 Rob. A. R. 138.

(a) The doctrine of the British Courts proceeds, as is at once seen, not so much upon its supposed correctness in point of principle, as upon the general usage of

nations, and particularly of *Great Britain*. The question has been argued upon principle in the Supreme Court of the United States,* and after elaborate discussion, it has been finally adjudged that a condemnation of prize property, while lying in a neutral port, or in the port of an ally,

and *Holland*, and reluctantly admitted by the² High Court of Admiralty of *England* has, after much diversity of opinion, been adopted by the Courts of the *United States* (i).

As to States in alliance with the captors, and at war with the country to which a captured ship belongs, they are considered as forming one community with the captors (k), and a prize carried into such a state may be legally condemned, either there by a consul belonging to the nation of the captors, or in the country of the captors (l). §

If a neutral state seize and sell a vessel, there being no sentence of condemnation, the property in the vessel is not changed (m).

Capture by *pirates*, who are merely robbers at sea (n), does not divest the property of the owner; and in a very early period of our history, a law was made for the restitution of property so taken, if found within the realm, belonging as well to strangers as Englishmen. But capture by an enemy, in the exercise of war between two nations, does, according to the law of nations, wholly divest the property of the owner, and transfer it to the captor or the sovereign of his state at *some* period (o). The *African* States having now acquired the character of established governments, and having regular treaties with this country, are not at present considered as pirates. And, therefore, in the case of a British ship captured by the *Algerines*, and sold under the authority of the Dey of *Algiers*, before the *Spanish* Consul, to a merchant of *Minorca*, who transferred it to a British merchant under the sanction of the Judge of the Vice-Admiralty Court at *Minorca*, the Court of Admiralty here refused to award restitution to the original owner. (p)

The subject of Restitution on recapture, will be mentioned in the chapter on Salvage.

is valid, and may be rightfully proceeded in by the Courts of the captors. *Hudson v. Guestier*, 4 Cranch Rep. 293; S. C. 6 Cranch, 281. *The Arabella and Madeira*, 2 Gall. Rep. 368. Story, note to American edition.

(i) "*Placuit gentibus*," said Lord Stowell, "is an expression of Grotius, in my opinion perfectly correct, as intimating that there is a use and practice of nations to which we are now expected to conform."

(k) *The Betsey Kruger*, 2 Rob. A. R.

210. *Oddy v. Bovil*, 2 East, 473.

(l) *The Christopher Slyboom*, 2 Rob. A. R. 209.

(m) *Wilson v. Forster*, 6 Taunt. 25, and 1 Marsh. 425.

(n) 27 Ed. 3, s. 2, c. 13. Year book, 2 Rich. 3. 2 Jenk. Cent. p. 165.

(o) Hale's Treatise, in three parts, part 2, ch. 28; in Hargrave's Law Tracts, p. 246. *Goss v. Withers*, 2 Burr. 683. 1 Rob. A. R. 59. *Marsh. on Insurance*, p. 427.

(p) *The Helena*, Hilslop, 4 Rob. A. R. 3.

5. It seems proper in this place to take notice of a question, on which formerly much misconception existed; how far, and under what circumstances, the legal title and ownership of a ship attach to themselves the responsibility of paying for repairs or necessities ordered by other persons. A notion at one time prevailed, and it was countenanced by high authority (*d*), that the registered owners were in all cases liable for repairs done, or necessities supplied to a ship, and actions were continually brought against persons whose title appeared complete, upon the register, when in fact, the credit had been given to others.

The title to a ship may furnish evidence that repairs are done, or stores supplied, under the authority and upon the credit of the legal owner, as, in fact, they generally are; but it does no more, and, therefore, if it appear that they were made or supplied under the authority, and upon the credit of another, the legal owner will not be answerable (*e*). § Thus, where the purchaser of a ship, in the interval elapsing between the inception and completion of his conveyance, ordered the master to take her to a shipwright to be repaired, which was done accordingly, the seller, although deemed to be the legal owner at the time, was held not to be answerable to the shipwright (*f*). “The case,” said Lord Ellenborough, “is too clear to require argument. It is true that the requisites of the act have not been complied with; and it is true that the owners of a ship are liable for repairs ordered for *them*, or for *their* benefit, by *their* master; but it was never heard of, that if a stranger ordered repairs for another’s ship or carriage, the owner was liable for such repairs. Suppose a pirate ran away with a ship, would the owner be liable for repairs ordered by him? Now, here the captain, by the order of the purchaser, who was a mere stranger to these defendants in point of law, directed the plaintiff to make the repairs; how then, can the defendants, merely because they remained as owners upon the register, be liable for repairs ordered by the captain, under the authority of a stranger to the defendants? It would be contrary to the credit actually given, to hold the defendants liable.” In the more recent case of *Jennings and Griffiths* (*g*), it was sought to charge the

(*d*) See *Westerdell v. Dalo*, 7 T. R. 306, and the judgment of Lord Mansfield, in the case of *Reid v. Coe*, 1 Cowp. 636.
 (*e*) *McIver v. Humble*, 16 East, 169.

(*f*) *Young v. Brander*, 8 East, 10.
Baker v. Buckle, 7 Moore, 349.
 (*g*) 1 *Ryan & Moody*, 42. See also *Harrington v. Fry*, 1 C. & P. 289.

defendant for repairs done to a ship, on the ground that he was the registered owner. The evidence of the registry was rebutted on the part of the defendant, by proof of the transfer of his interest by bill of sale, which had not been registered. Lord Tenterden said, "The object of the legislature in passing the Registry Acts, was clearly one of general policy, namely, to prevent foreigners from participating in the advantages which it was intended to give to *British* shipping only, and the use of the registry is to enable the government officers to ascertain, at all times, that the real owners are *British* subjects. Soon after the passing of these acts, the leaning of courts of law in their construction, was to say that the registered owners of ships should, at all events, be liable for repairs. But the subject having become more accurately understood, a better and more correct principle now prevails, and the recent cases have decided that the true question in matters of this description is, 'upon whose credit was the work done?' That question would, in most cases, be decided by the fact of legal ownership—the repairs being generally done for the legal owners. But it may so happen that the name of a person may be retained on the registry, after he has ceased to be beneficially interested in the ship, or to interfere with its concerns. In the case before you, it does not appear that the defendant had the slightest knowledge of the work being done, nor that the plaintiff had any reason to suppose him connected with the vessel. The repairs were ordered by the direction of a captain appointed by a stranger to the defendant, and that too whilst he was residing in a distant part of the country. The question for you to consider is, were or were not these repairs done upon the credit of the defendant?" So in the case of *Trewhella v. Rowe* (*h*), where a ship was sold in the interval between an order for stores given by the seller, and the delivery of them on board, the purchaser was held not to be responsible for them, although he was responsible for such articles ordered by the master after his purchase.

6. Upon the same principles have been determined the cases in which the question has arisen, whether the charterers or hirers of a vessel for a specified time, or adventure, or the absolute owners, are liable for repairs done, or stores supplied to her? Here again the question has been, on whose credit was the work done, or the goods

supplied, by ~~who~~ servant was the order for them given? In *Frazer v. Marsh* (j), the defendant being the registered owner of a ship, let her by charter party for a given number of voyages, at a certain rent to *Walker*, who was then the captain of her, and who, afterwards ordered stores for her use, which were supplied by the plaintiff, for the value of which the action was brought. Lord *Ellenborough* said, "The question is, whether the captain, in this instance, who ordered the stores, were or were not the servant of the defendant, who is sued as owner? And as they do not stand in the relation of owner and master to each other, the captain was not the defendant's servant, and, therefore, the latter is not liable for his act."

In the recent case of *Reeve v. Davis and Others* (i), which was assumpsit for goods sold, work, &c., the defendants were the registered owners of a steam-vessel, for which goods were supplied and work done, chiefly upon orders given by one *Thompson*, who was the captain; some also were given by the ship's husband and the engineers. The vessel was let to *Thompson* by a charter party, under seal, executed by himself and the defendant, *Davis*, acting for himself and the other owners. By this charter party, the defendant hired and let to freight, and *Thompson* engaged and took to freight the vessel for twelve months, to be employed in carrying passengers and goods between *London* and *Topsham*, in *Devonshire*. The defendants engaged to keep the engine in repair, *Thompson* himself to do all other repairs; to pay all wages of persons employed on board during the term, all charges attending the working and sailing of the vessel, piloting and port-charges; to indemnify the owners against all debts, costs, damages, expenses, &c., incurred by the vessel, or any person employed on board, or by *Thompson*, for and in respect of the said charter party, and employment of the said vessel; to pay the hire of the vessel monthly; to insure in the name of the owners; to keep all the vessel in repair, except the engine, and to deliver her up in good repair at the end of the term. The owners were to appoint the engineers, but they were to be paid by *Thompson*.

The plaintiff was unacquainted with the above contract; and it was contended that the defendants were liable, as owners of the vessel. Lord *Denman* said, "The question is, who were the

(i) 1 Adol. & Ellis, 312.

(j) 13 East, 238.

contracting parties? The mere circumstance of ownership may be sufficient to create a liability, where the vessel has been left under the control of a party who has given orders, if no *intervening* ownership has been created. But if a ship is let out to hire, I do not see how the owners are liable for work done upon it by order of the party hiring, more than the landlord who lets a house." §

7. Whether the mortgagee of a ship is to be deemed in law the owner of it; entitled to the benefits, and liable to the burthens which belong to that character, before he takes possession, was formerly an important question, on which persons of eminent talents differed in opinion.

The first decision which I find in our books upon this subject, is the case of *Chinnery v. Blackburn* (1); which was an action brought for the freight of goods from *Antigua* to *London*, and upon the trial whereof, it was proved in evidence, that by an indenture of assignment, dated *January 4, 1783*, *Robert Merryfield*, in consideration of 1166*l.* 18*s.*, which he owed to the plaintiff, assigned to her the ship *B.*, &c., in which indenture, there was a covenant from the plaintiff to re-assign the said ship, &c. to *Merryfield*, on payment of 1166*l.* with lawful interest, on or before the 10th of *November*, then next ensuing; that at the time of the execution of the deed, the ship was in the River *Thames*, and afterwards sailed to *Portsmouth*, and continued there till the middle of *March* following, in the possession and under the command of *A. B.*; and that the plaintiff did not then take possession; that *Merryfield* navigated, victualled, and manned the ship as owner thereof, at his own expense and risk, both from *England* to *Antigua*, and on her return from thence. That *Merryfield*, at *Antigua*, gave the command of her to one *Drysdale*, and sent her to *England*, with orders to *Drysdale* to address himself to Messrs. *Dunlop* of *London*, merchants, who were to sell according to the directions contained in a letter, in which letter *Merryfield* also mentioned that the plaintiff had a demand against him for near 1200*l.* sterling, which he hoped to remit shortly. That Messrs. *Dunlop* being applied to as consignees, lent two sums of 50*l.* to *Drysdale*, the master, declaring that they should consider him as responsible, in case they should not receive the same by

(1) In K. B. Easter Term, 24 Geo. 3. See *Kerswell v. Bishop*, 2 Crompt. & reported in a note 1 Hen. Black. 117. Jerv. 529.

freight, &c.; and that they afterwards received the money from *Drysdale*; that the ship completed the delivery of the cargo on the 27th of September, 1783; that the plaintiff took possession on the 29th of September following, immediately on receiving information of her arrival in the *Thames*: that the defendant had goods from *Antigua* on board, the freight of which amounted to 76*l.* 9*s.* 11*d.*, for the recovery of which the action was brought; that *Drysdale*, the master, paid for lights, custom house dues, and for clearing the ship, which the plaintiff repaid him, and she also paid his and the mariners' wages for the voyage from *Antigua*, to the amount of 234*l.* 7*s.* 7*d.* after she took possession of the ship, and that the plaintiff afterwards sold the ship by auction for 710*l.*

Upon this state of facts, the question for the opinion of the Court of King's Bench was, whether the plaintiff, the mortgagee of the ship, was entitled to receive the freight earned by the ship after the date of the mortgage, and before the plaintiff had taken possession of the ship, and while the mortgagor had acted as owner and employer of the ship, the merchant not appearing to have any counter claim or demand upon the mortgagor which would have furnished a defence to an action at his suit. And the Court of King's Bench decided that the plaintiff was not entitled to the freight under these circumstances; they considered the contract for the carriage of the goods, upon which the demand arose, to have been made with the mortgagor on his own account, and not as an agent for the mortgagee; and Lord *Mansfield* said, "Till the mortgagee takes possession, the mortgagor is owner to all the world, and he is to reap the profits." And Mr. Justice *Buller* said, "If the mortgagor be considered as agent, he must be so throughout, and then the mortgagee would be answerable for every loss, damage, &c." And it was observed, that the payments which the plaintiff had made to the master, &c., were voluntary payments to get possession of the ship free from any lien.

It seems that the learned judges by whom this case was decided, were of opinion, that a mortgagee, who had not taken possession, would not be liable for such repairs or other expenses, as are not a charge upon the ship itself in specie. And so the law was afterwards held to be in the case of *Jackson v. Vernon* (*m*)

(*m*) *Jackson v. Vernon*, 1 Hen. Black. 114.

by Mr. Justice *Heath*, and Mr. Justice *Wilson*,² the only judges present in the Court of Common Pleas at the decision of that case. It was an action for the price of ropes, cordage, and other stores furnished in this country to a ship, by the order of one *Palmer*, between the date of a mortgage of the ship, executed by him to the defendant, and the time when the defendant had possession of the ship in pursuance of the mortgage. In the determination of this case of *Jackson v. Vernon*, some reliance was placed on a case (n) decided in the Court of King's Bench, with respect to real property, in which it was held, that a person to whom a term for years had been assigned by way of mortgage, but who had not taken possession of the premises, was not liable to pay the rent reserved upon a clause by which the term was created. The propriety, however, of this decision, with respect to real property, has been since doubted; and it seems evident, from the judgment pronounced by Lord *Kenyon*, in the case of *Westerdell v. Dale* (o), that his lordship considered the mortgagee of a term of years to be liable to the rent reserved, and the mortgagee of a ship to be liable to the repairs, although his lordship and the other judges declined to give a positive opinion on these points, because the determination of them was not necessary to the decision of that cause.

Neither of the cases before mentioned seems to afford an authority, upon the general and abstract question of the right or obligation of the mortgagee; for, in the first, the mortgagor himself at *Antigua* acted personally in the management of the ship as owner; in the last, the mortgagor himself ordered the repairs, and, therefore, the credit might not unreasonably be deemed in law to have been given, as in fact it certainly was, to him and not the mortgagee.

§ The question arose more properly in the case of a contract made by the master, in that character. Such was the case of *Twentyman v. Hart* (p). This was an action of assumpsit to recover the amount of necessaries provided for a vessel, of which the defendant was the mortgagee. *Flowerdew*, the owner of the vessel, being indebted to the defendant, indorsed the certificate of registry to him as a collateral security, and afterwards a new register was made in the name of the defendant. The defendant afterwards delivered up the old certificate, but did not make a

(n) *Eaton v. Jacques*, Doug. 454.

(p) 1 Stark. 366.

(o) 7 T. R. 336. 1 Rose, 447.

re-transfer of the vessel. The order for the goods was given by the captain of the vessel, who gave the name of *Flowerdew* as the owner, and the plaintiff knew no other owner in the transaction. Lord *Ellenborough* said, "Since the repairs were done by order of the captain, and the plaintiff knew no owner except *Flowerdew*, and the defendant was never in possession of the ship, the plaintiff must be called." The case of *Annett v. Carstairs* (q), was decided upon the same grounds. It was an action brought for the plaintiff's wages, and disbursements as master of the ship *Airly Castle*, of which the defendants were alleged to be the owners. It appeared, that in August 1810, *W. Masson* was the sole owner of the vessel in question. At that time, he borrowed the sum of 15,000*l.* from the Commissioners appointed by an act of Parliament, to grant loans for the relief of people in trade. The defendants became his sureties to Government, and for their indemnification he transferred to them the legal title to the ship *Airly Castle*. She was registered in the port of *London*, but happened to be at *Portsmouth*. *Masson* executed an absolute bill of sale of the vessel to the defendants, for the nominal consideration of 10*s.* This was lodged at the Custom-house, and a few days after, an indorsement was made on the certificate of registry, according to the Register Acts. At the same time, a mortgage deed was executed, conveying the vessel to the defendants for their indemnification, and containing a covenant to re-transfer her to *Masson*.

The plaintiff had previously been employed by *Masson* as master of the *Airly Castle*. He had no direct information of the above transaction, but the enclosed certificate of registry was delivered to him, which showed that the defendants had become the registered owners. He was never introduced to them, or received any orders from them, or had any communication with them respecting the concerns of the ship. On the contrary he continued to correspond with *Masson* as owner. Soon after the transfer he sailed to the *West Indies*, and thence to the *Havannah*, from which he brought home a cargo to *England*. During the voyage he received *Masson's* instructions for his conduct, and on his return he gave the documents for securing the freight to *Masson*, who received it accordingly, and applied it to his own use.

Upon these facts it was contended that the defendants were the

legal owners, that an action might have been supported against them, at the suit of a person who repaired the ship, after the transfer, by the captain's orders, and that as he could give an action against the defendants to a stranger, he might surely maintain one himself. Lord *Ellenborough* said,—“ We are here to consider with whom has the plaintiff contracted? There is express privity of contract between him and *Masson*. The legal ownership of the ship thus becomes immaterial. The transfer of the title to the defendants did not at all affect the relation subsisting between *Masson* and the plaintiff. The plaintiff was employed by *Masson*, originally, and continued to treat him as his employer throughout. What right can he have then to resort to the defendants? It might as well be said, that if I mortgage my estate, my steward, who continues to manage it for my benefit, may maintain an action for work and labour against the mortgagee. Title has nothing to do with these cases, we must look to the contract between the parties.”

In the case of *Briggs v. Wilkinson* (r), it was sought to charge the defendant, the mortgagee, for goods supplied to the ship, on the order of the mortgagor, who had been before, and continued after the execution of the bill of sale, to act as ship's husband to the vessel. The plaintiff, when he supplied the goods, did not know that the defendant was interested in her, nor had *Wilkinson* at that time taken possession, or interfered in the concerns of the ship. The Register Act, 4 Geo. 4, c. 41, being in force at the time of the transfer, and it not appearing on the register, or the indorsement on the certificate of registry, that it had been made by way of mortgage; it was urged that the defendant was owner, and liable to all the responsibilities of owner. But Lord *Tenterden* said, “ It appears to me that the only question for our consideration is, whether the repairs done, and the stores supplied to the ship in question, can be considered as having been done and supplied on the authority of *Wilkinson*, either express or implied.”

It thus appears, that the registered owner, the mortgagee, the charterer of a ship, are none of them as such, necessarily liable for repairs done to her, or goods supplied. Orders are received from the person, usually the master, in apparent charge and custody of the vessel, against whom personally, unless at the time

of dealing he disclaimed all personal responsibility (*q*), the tradesman has a right of action. But if that be unsatisfactory, as it frequently must be, he should, before he seeks his remedy against others, inquire, for *whose* use and benefit his labour was given, or his goods supplied; *who* were the immediate owners, absolute or temporary at the time the orders were received; under *whose* authority the captain acted; *whose* servant or agent was he at the time he gave them, and he may save himself much trouble, if, instead of relying blindly on "the credit of the ship," or "of the owners of the ship," he be advised to make all these inquiries before he sets to work, or parts with the possession of his goods.

We have seen that by recent acts of Parliament (*r*), when a transfer is made only as a security for the payment of debts by way of mortgage, or of assignment to trustees for sale, on a statement being made in the book of registry to that effect, the person to whom the transfer is made, or any other person, claiming under him, is not to be deemed the owner, nor is the person making such transfer to be deemed to have ceased to be the owner, except so far as may be necessary for the purpose of rendering the ship transferred available, by sale or otherwise, for the payment of those debts, to secure which the payment was made.

The primary intention of this enactment, was probably to ascertain and define the real quality and amount of a mortgagee's interest, as the ground-work of the provision in the following section, which protects it, when explained, in the Book of Registry, and indorsed on the Certificate of Registry, against the assignees of a mortgagor becoming bankrupt, while the ship itself continues in his order and disposition as reputed owner. But it had other most beneficial objects (*s*). By the

(*q*) *Garman v. Bennett*, 2 Stra. 816. *Wilkins v. Carmichael*, Dougl. 101. *Farmer v. Davies*, 1 T. R. 108. *Hoskins v. Slayton*, Ca. temp. Hardw. 376. *Essery v. Cobb*, 5 C. & P. 358. *Castle v. Duke*, 5 C. & P. 359. *Thompson v. Findon*, 4 C. & P. 158.

(*r*) 4 Geo. 4, c. 41. 6 Geo. 4, c. 110. 3 & 4 Wm. 4, c. 55, s. 42.

(*s*) No legislative enactments can save people from the consequences of their own improvidence. Tradesmen supplying stores to ships, should ascertain on whose account and by whose servants they are ordered.

By reference to the Register at the ship's home, or the certificate of registry elsewhere, they may always readily learn what amount of beneficial property, available for their security, the owner has in the ship. An evil has sprung up since the passing of this act, little expected by its promoters, and not fairly imputable to any of its provisions. The mortgage of a ship being protected against the creditors of a bankrupt shipowner, is now a safe security for money; and men of small means are thus enabled to impose upon careless tradesmen by the appearance of

old Registry Acts, upon any alteration of property in any ship or vessel, an indorsement upon the certificate of registry was required to be made; and by the 34 Geo. 3, c. 68, s. 15, a form of indorsement applicable in its terms to an absolute sale or transfer only, was prescribed. At the custom-house, no deviation from this form was permitted, and the consequence was, that the register furnished no means of distinguishing, between a transfer by way of mortgage and an absolute change of property. Between the mortgagor and mortgagee this difficulty was obviated by executing two deeds, one an absolute conveyance (*s*), the other a deed of defeazance the former of which only was registered. But strangers consulting the register or the certificate of registry for information, were frequently deceived by the entry, and so long as the register was considered by the Courts conclusive as to the fact of ownership; and ownership, when ascertained, was held to involve a responsibility for repairs and necessaries, without regard to the credit actually given, persons taking mortgages of ships were liable to sustain a loss, from the very act intended for their security.

When the true criterion of liability had been determined by the decisions above considered, much of this mischief was removed, but the tradesman was still left without the means of ascertaining what amount of beneficial interest in the ship really belonged to the apparent owner, and was often misled by the register, on which a trustee or mortgagee appeared as absolute owner, to seek payment for his labour or his goods, from one to whom, upon inquiry, it was clear that credit had not been given.

Since this enactment, it has been doubted whether a mortgagee can insure the entire value of the ship (*t*). Yet, in the case of *Dean v. M'Ghie* (*u*), it was assumed that the words in the 45th section of 6 Geo. 4, "*except so far as may be necessary to render the ship available by sale or otherwise*," preserve to the mortgagee his right to take possession of the ship, and to claim the freight earned by her, and accruing due after he has taken possession; and in the recent case of *Kerswell v. Bishop* (*v*), which was sent by the Master of Rolls for the opinion

property in ships which is found, when inquiries become necessary, to be little more than nominal.—Ed.

(*s*) See *Reid v. Cox*, 1 C. & P. p. 602. *Thompson v. Smith*, 1 Mad. 395.

(*t*) *Irving v. Richardson*, 2 B. & Ad. 196.

(*u*) 4 Bing. 45.

(*v*) 2 Crom. & J. 529, and 2 Tyrwhitt's R. 603.

of the Court of Exchequer, in which the mortgagee of a vessel sought to recover freight accruing due after he had taken possession, although the mortgagor had been at the expense of the outfit (v), it was certified that the plaintiff was entitled to recover. §

8. It often happens that the charterer of a ship causes it to be laden either wholly or in part with goods belonging to other persons; in such cases, it seems that the charterer is to be considered as the owner of the ship with respect to those persons. But as different decisions have taken place it is proper to notice them here.

In the case of *Parish v. Crawford* (w), an action was brought against the defendant as owner of a ship, upon a promise alleged to have been made by him to the plaintiff to convey in his ship a quantity of moidores from *London* to *Barbadoes*, which had not been delivered there. The facts of the case were, that the defendant, the owner, had chartered the ship to one *Fletcher* for the voyage in question for a certain sum, and *Fletcher* was to have the freight of goods; but the freight of passengers was reserved to the defendant; and the defendant appointed the master, and covenanted with *Fletcher* for the condition of the ship and behaviour of the master. *Fletcher* took on board the moidores and other goods of the plaintiff and other persons, and received the freight for them. For the defendant it was objected, that although the ship was his property, yet he was not owner in such a manner as to be liable to this action, but that *Fletcher* was for this purpose the owner. Chief Justice *Lee*, however, before whom the cause was tried, was of opinion that the action might be maintained; and the plaintiff recovered damages to the value of the ship and freight (x). The sentiments delivered on this occasion by the Chief Justice were as follows: "The true consideration is, whether by any thing done by *Crawford*, who is confessedly the owner of the vessel, in chartering it to *Fletcher*, he has discharged himself as owner? *Crawford* considers himself as the governor of the ship, and so covenants for the government of it during the voyage, and the ship was navigated by his master. Upon what foundation then is an owner chargeable, but upon these two considerations? First, The benefit arising from the

(v) See *Robinson v. McDonnell*, 5 M. & S. 228.

(w) Shortly reported in 2 Stra. 1251. The account of the case here given, is taken from a manuscript note much fuller

than the report.

(x) 12 Geo. 2, c. 15. A statute which limits the responsibility of the owners. See part the third, ch. 5.

ship, which is the equitable motive. *Secondly*, The having the direction of the persons who navigate it. And it is upon these two things taken together, that the implied contract arises. Though *Crawford* has not that freight, which the merchants pay for their goods, yet as he has the benefit of the freight in general, he has that equitable motive which makes him liable. With regard to *Fletcher*, what *Crawford* has done is only giving him a power to put goods on board. And it seems to me, the makers of the act of parliament could not have any notion of such an owner of the ship, for it speaks generally of owners of ships; but this *Fletcher* is not to be considered as owner of the ship in any light, but only as having a power to make use of it in this way. If this was to be considered in the nature of a mortgage it would be delivering up the ship for such time as the mortgage should be in force. Therefore I think there is nothing appearing upon this evidence that discharges *Crawford* as the owner of the ship."

In the case of *James against Jones and others* (y) an action was brought against the defendant as owners of the ship *Sea-Flower* for the loss of a quantity of raisins on a voyage from *Faro* to *London*. One *Thomas*, the master of the ship, had, in his own name as master, and in the absence of the owners, chartered the ship to *Reed* and *Parkinson* on a voyage from *Falmouth* to *Faro* and back to *London*; and *Reed* and *Parkinson* engaged by the charter-party to provide a full lading from *Faro*, and to pay a stipulated price per ton. The goods in question were shipped at *Faro* by the consent of the agent of *Reed* and *Parkinson* at that place, and *Thomas*, the master, signed a bill of lading, engaging to deliver them to the plaintiff, "he paying freight per charter-party." These facts appearing at the trial of the cause before Lord *Kenyon*, his Lordship was of opinion, that *Reed* and *Parkinson* were, with respect to the plaintiff, the owners of the ship *pro hac vice*; that the defendants, *Jones* and *others*, were not responsible to him, and consequently that the plaintiff could not maintain his action. Under this opinion the plaintiff and his counsel acquiesced, and did not apply to the Court for a further consideration of the subject. But the before-mentioned case of *Parish* against *Crawford*, does not seem to have been adverted to on this occasion. In a more recent case, in which it appeared at the trial, that a ship had been

(y) *James v. Jones and others*, Guild-^{*} There is a short note of this case in *Es-*
hall Sit. after Trin. Term, 39 Geo. 3. *pinasse's Nisi Prius* cases, vol 3, p. 27.

chartered by the Defendants, who were the registered owners, to one *De Beur* on a voyage from *London* to *Surinam*, and was afterwards put up by him as a general ship, and that the plaintiff had shipped a quantity of oats which had been improperly sold by the master, and for which the action was brought, the late very learned Chief Justice of the Court of King's Bench held the defendants were not answerable, and the plaintiff was nonsuited. The form of the bill of lading is not noticed in the report of this case, and therefore, I presume, it was not thought material at the trial (a). The gentlemen, who were counsel for the plaintiff in this cause, were certainly aware of the case of *Parish v. Crawford*, but they acquiesced in the decision.

These two cases are inconsistent with the former, but they are conformable to the principle of judgments pronounced respectively by the Courts of King's Bench and Common Pleas on questions of Insurance, wherein it was decided, First(a), that a deviation committed by the master, with the knowledge of the absolute owner, and which, therefore, could not, according to the law of *England*, be an act of barratry with respect to *him*, was an act of barratry with respect to a third person, who had hired the ship by a charter-party, and who was considered as owner for the particular voyage, with relation to the subject of that cause; Secondly(b) that a wilful running ashore by the absolute owner, with the privity of the master, was an act of barratry against the merchant, under whose sole control the entire vessel for a time was placed. And probably the case of *Parish v. Crawford* is not to be considered as law; for although the absolute owner might in each of these cases be ultimately answerable to the charterer of the ship, yet there was no contract, either express or implied, between him and the proprietors.

§ In all such cases the real question appears to be, whether the contract of the proprietor of the goods was made with the absolute owner, or with the charterer of the vessel, and its decision will generally depend upon the further question, who was the *immediate* owner in possession of the vessel at the time the contract was made? In the case of an actual *demise* of the vessel, it is not disputed that the lessee becomes for the term to all intents and purposes the owner. Whether there be such a demise to him

(a) *Mackenzie v. Rowe and other*,
2 Campb. 482.

(u) *Vallejo v. Wheeler*, Cowp. 143.

(b) *Soares v. Thornton*, 7 Taunt. 627.

as constitutes him owner for the term, is to be collected from the language of the charter-party and the nature of the ship's employment. The contract between the shipowner and the merchant may be *locatio navis*, a demise of the ship itself with its furniture and apparel, it may be *locatio navis et operarum magistri*, a demise of the ship (c), "in a state fit for the purposes of mercantile adventure," or it may be "*locatio operis vehendarum mercium*," a contract for the carriage of the merchant's goods in the owner's ship, and by his servants.

Respecting the first of these modes of demise no difficulty is likely to arise, but on the question, whether the charter-party be a demise of the second kind, or a mere contract for the use of the ship with the services of the captain and crew, the solution of most important points in maritime law, and among them the responsibility of the general owner to third parties depends (d).

In a question of construction it is impossible to lay down a rule of universal application, but it seems to result from the cases decided upon this subject; that when by the terms of the charter-party the master and mariners are to continue subject to the orders of the shipowner, he retaining through them the possession, management and control of the vessel, it is to be considered as a contract to carry the freighter's goods, but where the merchant engages to pay a stipulated price to the shipowner for the use of his ship, for the voyage, by the month or year—takes it and them into his service—receiving the freight actually earned by it to his own use, the master and mariners becoming subject to his orders, and the general management and control of them and of the vessel, being given up to him, it is a demise of the vessel with her crew for the voyage, or the term specified; the charterer becomes owner *pro hac vice* (e) entitled to the rights and subject to the responsibilities which attach to that character.

(c) See the observations of Tindal, C. J., on the case of *Newberry v. Colvin*, 7 Bing. 190; post, p. 40. Pothier *Traité de Charte Partie*, p. 1, s. 5.

(d) See post, on Lien for Freight, Stoppage in Transitu, &c.

(e) The question, who is to be considered as owner for the voyage* in cases of charter-party, so as to create a liability for repairs or breaches of duty, has been several times litigated in the American

Courts. In an action on a policy of insurance, brought by the plaintiff, to recover for a loss in the voyage, one of the losses being assigned to be barratry by the master, the question arose, who was owner for the voyage? The Court, in delivering the judgment, said, "A person may be owner for the voyage, who, by a contract with the general owner, hires the ship for the voyage, and has the exclusive possession, command, and navigation of the ship.

Thus in the case of *McKenzie v. Rowe*, above cited, the proof of the charter to *De Beur*, and of the vessel's being put up by him as a general ship, shewed that she was under his control and management, and that the shipper's contract was with him.

So in the case of the *Trinity House v. Clark (f)*, which was an action of assumpsit for tolls claimed to be due from the defendant, as owner of the ship *Britannia*, in respect of certain lights on the coast, and of the buoys and beacons coming up the Thames. The defendant having chartered his ship to the commissioners of the transport service, on behalf of the Crown, the question was, whether he was liable to pay any portion of these tolls during the time she was in the service of the Transport Board. On the part of the defendant it was contended that the Crown, during the period of the ship's employment under the charter-party, was to be considered as owner of the ship, and that the defendant was not liable to pay the tolls.

"It is urged," said Lord *Ellenborough*, "that the use and service only of the ship are parted with, and that the possession and ownership are retained, by the conduct and navigation being left to the master and crew, who are the servants of the proprietors of the ship, chosen and fed and paid by them. We are, however, of opinion, that the arguments tending to shew that the

Such is understood to have been the case in *Vallejo v. Wheeler*, Cowp. R. 143. But where the general owner retains the possession, command, and navigation of the ship, and contracts to carry a cargo on freight for the voyage, the charter-party is considered a mere affreightment, sounding in covenant, and the freighter is not clothed with the character or legal responsibility of ownership. Such was the case of *Hool v. Groverman*, (1 Cranch, 214,) in this Court. In the first case, the general freighter is responsible for the conduct of the master and mariners during the voyage; in the latter case, the responsibility rests on the general owner. On examining the charter-party in the present case, there can be no doubt, from the terms and stipulation, that it falls within the latter class of cases. The master, who was the general owner, retained the exclusive possession, command, and navigation of the vessel, and she was navigated at his ex-

pense during the voyage."

The same doctrine was stated by the Supreme Court of New York, in *McIntyre v. Browne*, 1 John. R. 229. A. chartered a vessel to B. and C. for a particular voyage, retaining half the cabin, and certain privileges for the master and mate, and covenanted to hire and pay the master and men, and furnish provisions for the voyage, &c. The Court said the true distinction was, "that where, by the terms of the charter, the shipowner appoints the master and mariners, and retains the management and control of the vessel, the charter is rather to be considered as a covenant to carry goods; but where the whole management is given over to the freighter, it is more properly a hiring the vessel for the voyage, and, in such case, the hiree would be deemed owner *pro hac vice*."—Mr. Justice Story's note to the American edition, p. 23.

(f) 4 M. & S. 288.

possession passed to the Crown during the term and service of the ship, outweigh those which lead to the contrary conclusion. The terms are proper terms of *grant* and *demise*; the sum to be paid is in the nature of rent for the use of a chattel; the whole use of the ship is warranted; the term is sufficiently fixed, and the certificates, which the parties are to procure to entitle them to the rent, are worded so as to recognize the possession. In truth, the supposed reservation of the possession to the master and crew, is not exclusive, as is contended for. The occupation of the different habitable parts of the ship is arranged by the terms of the contract, and a place provided for the residence of the agent for the Crown. The whole argument appears to rest on a fallacy; the possession, such as it is of the master and crew, is not retained by the proprietors of the ship, to restrain or interfere with the full and free use of the ship which they have let to hire for a term, but as subsidiary and subservient to such use. It is not only consistent with the entire ownership and possession of the vessel on the part of the Crown during the period for which it is let, but it is a farther means provided to enable the Crown fully and beneficially to enjoy the same, by letting at the same time out to the Crown the services likewise of those by whom the vessel might be best conducted under the direction of the Crown, in the prosecution of the object for which the Crown hired it. The vessel, therefore, is not only hired, but along with it the services also of a certain number of persons paid by the proprietors, and these services are necessary to the use of the vessel which the proprietors have expressly warranted to the Crown. It is the same thing as the hire of a waggon and team for a certain time; the proprietor of the waggon stipulating that the waggon should be driven and the horses taken care of by his own waggoner, and by whom he was to be fed. In such a case it could hardly be made a question that the waggon and team were in the possession of the hirer during the harvest, or whatever the term may be for which they were hired. This is, indeed, *idem per idem*; but as the instance is more familiar, it serves to put the point in a clearer light."

This decision proceeds not upon any particular words, though due weight be given to every word, but upon the terms of the charter-party altogether, reference being had to the object and nature of the service in which the ship was employed. Many other cases, which will be noticed in another part of this work, have been determined on the same grounds. The recent case of *New-*

berry v. Colvin (g), in the Exchequer Chamber, may properly be considered here.

This was an action on the case against *Newberry*, the defendant below, for the loss of goods shipped by the plaintiffs in *India*, to be conveyed to *England*.

The goods were shipped by the plaintiffs, on board the *Benson*, and bills of lading, in the usual form, were signed for them by *George Betham*, then being master of the vessel, under a charter-party, in substance, as follows:—(g)

The owner appointed *Betham* to the command, and he agreed to take the command, and receive the ship into his service for twelve months certain, and such longer time as might be necessary to complete the voyage, and pay to the owner for the use and hire of the ship, after the rate of twenty-five shillings per ton, per month. And it was further agreed that the said *George Betham* was to provide, at his own expense, all necessaries for the use of the passengers on board the said ship, pay and defray all port charges and pilotage; remit all freight bills for the homeward cargo, to *B. B., and Co., in London*, who should hold them as joint trustees for the owner, and *George Betham*; that they should be applied to payment of the balance of freight due from *Betham*, and the surplus, if any, be handed over to him. It was then provided that the owner should have an agent on board, who was to have the sole management of the ship's stores, and power to displace *Betham* for breach of any covenant in the charter-party.

The plaintiffs below, shipped their goods with knowledge of the contents of this charter-party (h). The ship sailed on her voyage from the river *Hoo*, but the goods were never delivered to the plaintiffs or their assigns, pursuant to the bills of lading.

The arguments for the plaintiffs below, will be collected from the judgment of the Court of Error reversing that of the Court of King's Bench.

"The present action," said Chief Justice *Tindal*, "although

(g) 7 Bingh. 190. The reader is requested to refer to the report. The charter-party is too long for insertion here.

(h) See the case of *Major v. White*, 7 Carr. & Payne, 41, in which it was held

by Mr. Baron Parke, that an action could not be maintained against the owner of a ship for improper stowage of goods if the shipper knew when the goods were shipped that the vessel was chartered.

in form an action upon a *tort*, is virtually and substantially an action upon the contract contained in the bills of lading, and set out in the declaration. To decide, therefore, whether the action was rightly brought, it must be ascertained with whom the contract was made; whether with the defendant's below, as the owners of the vessel, through *Betham*, as their master or agent, or with *Betham* himself, as the freighter and owner *pro hac vice* for his own benefit, and on his own behalf. The question to be considered is simply that of the construction of the charter-party, and we think, upon the whole instrument taken together, the construction is such as to constitute *Betham as between him and the shippers of goods*, the owner of the ship during the continuance of the voyage described in the charter-party.

"In the first place, by the terms of the charter-party, the owners covenant 'that the ship shall, if required, be kept and continued in the service described therein during the term of twelve calendar months, and such longer time as may be necessary to complete the voyage.' And *Betham*, on the other hand, covenants 'to accept, receive, and take the ship into his service, for the term of twelve calendar months certain, until the voyage shall be ended, and to pay to the owner for the use or hire of the said ship, at and after the rate of twenty-five shillings per ton per calendar month during the said term of twelve calendar months certain, and until her return to the port of *London* and clearance, or up to the day of her being lost, captured, or last seen or heard of.'

"But it is objected by the plaintiffs below, that such contract contains no words of express demise, and undoubtedly it does not. But even in a lease of lands no such words are absolutely necessary, 'but any words which amount to a grant are sufficient for a lease' " (*h*). And there are cases in the books, that if a man covenants that A. shall have the land for a term rendering rent, or that the covenantee shall enjoy the land (*i*), these words would amount to a lease. Now, the present case comes very near those referred to; for the owners do covenant that the ship shall be kept in the service of *Betham* for a certain time. *Betham* covenants that he will receive her into his service during that time; and that he will pay for the use or hire of her a certain freight, stipulations that appear equivalent in their effect to an actual demise of the ship. But further, the whole of the ship is so far parted with

(A) Co. Litt. 45, b.

(i) 1 Leonard, 156.

that it is thought necessary that *Betham* should covenant with the owners that they should have liberty to load on the outward voyage, iron and other articles, not exceeding in the whole one hundred tons."

"Again, the mode in which the ship was to be used, and in which the freight reserved by the charter-party is to be paid, support the same construction of the charter-party. The ship, both on her outward and her homeward voyage, was to be put up by *Betham* (in many parts of the charter called the freighter) as a general carrying ship. The freight which the owners stipulate to receive from him is quite independent of that which he receives for the carriage of goods. Theirs is a time freight; his depends upon the carriage of the goods shipped. If the ship went out without any cargo, or was lost before her arrival at her outward or homeward port of destination, in all which cases *Betham* might receive no freight, the owner would still receive the same amount as if she had returned full, or in case of loss of the ship, up to the day of her loss. Under these circumstances, we think the captain, in putting up the ship as a general ship, and signing bills of lading, cannot be considered as acting as the servant of the shipowners, or in any other manner than as the temporary owner of the ship. It is almost the invariable practice and usage that the owners of a ship, although they let it out upon freight to a charterer, do themselves appoint a captain and the crew, *the chartering of the ship* not being so much *the chartering of the hull* as of *the ship in a state fit for the purposes of mercantile adventure*. There seems no reason, therefore, that the chartering of the ship in any particular case to the captain of that ship, should create any more responsibility in the owner to the shippers of goods where such fact is made known to them, than if the ship were freighted to an entire stranger."

"With respect to the agent appointed by the owners it appears that his authority was limited to the superintendence of the acts of *Betham*, as captain, and not as freighter; the utmost authority given to the agent being that of displacing the master and appointing another, in case *Betham* should be guilty of a breach of any of the covenants or agreements on his part. But, if *Betham* ceased to be master, he did nevertheless, by the terms of the charter-party, continue the freighter of the ship, possessing the same power to take goods on board, and liable to the same responsibilities on the one hand to the owners for the time of freight

for which he had contracted; on the other hand, to the shippers of goods for the safe conveyance of the goods shipped."

"As to the freight bills received by the freighter, the charter-party gives the owners a security upon them, but no strict or immediate interest in the freight earned, the whole of the surplus of which belongs to *Betham*. If *Betham* had obtained no homeward cargo from *Calcutta*, so that no freight bills could have been transmitted, the owners would still have been entitled to their true freight. The freight earned by *Betham* in the intermediate voyage for twelve months in India, does not become a security to the owners. Even in the homeward voyage, if the ship had been lost, there might have been no freight payable, but still he must have made good his own liability to a monthly freight for the use and hire of the vessel. Upon the whole, therefore, we think the effect of this charter-party was to make the freighter the legal owner of this ship *pro tempore*, that the freight for the carriage of these goods was paid to him for his own use, and consequently, that the defendants are not liable to an action for non delivery of the goods."

The case of *Newberry v. Colvin* was afterwards taken to the House of Lords, and the judgment of the Exchequer Chamber there affirmed (i). It will be seen that it was determined, upon a minute consideration of the effect of all the covenants in the charter-party, regard being had to the purpose and object of it, and the nature of the ship's employment. The result of that consideration was, that *Betham*, by the charter-party was constituted, *as between him and the shippers, owner pro hac vice* of the vessel, that he contracted with them, not as the agent of the owners, but on his own account, and therefore that he, and not the owners, was liable to the shippers for the non delivery of their goods, pursuant to the bills of lading.

From these cases it appears that the question, whether or not the possession of a vessel passes out of the owner to a charterer, depends upon no single fact or expression, but upon the whole of the language of the contract, as applicable to its attendant circumstances. The case of *Dean v. Hogg* (j) and *Lewis* may be referred to, in further illustration of this rule of construction. The defendant, *Lewis*, had hired a steam boat for a party of pleasure, to *Richmond*, upon the terms disclosed in the following letter from

(i) 1 Clark & Fin. 283.

(j) *Dean v. Hogg*, 10 Bing. 345.

the owner, "I note the *Adelaide* is engaged to you for *Richmond* or *Twickenham*, for *Tuesday* the 28th of *May*, at the hire for the day of 5*l.* 10*s.*, your party not exceeding fifty persons." The vessel was navigated by a captain and crew, employed and paid by the owner. As she was about to start from a quay in *London*, the plaintiff, a stranger to the defendants, and not aware that the vessel had been hired by him for the day, stepped on board, with the permission of the captain. The plaintiff being harshly warned to leave the vessel, refused to go, whereupon the defendants, with considerable violence, pushed him into a boat alongside, and in so doing, tore off the skirts of his coat.

For this assault the plaintiff brought an action of trespass, and having obtained a verdict, with damages, the question, upon a motion to set aside the verdict and enter a nonsuit was, whether, under the contract with the owner above stated, *Lewis* had such possession of the steam vessel, as would support the defendant's second plea, which alleged, that the defendant *Lewis* was lawfully possessed of the steam vessel, that the plaintiff was unlawfully in the steam vessel, from which he would not depart when requested, and then justified the committing of the trespasses by the defendants, in defence of the possession of *Lewis*, and in order to remove the plaintiff from the vessel. "There can be no doubt," said Chief Justice *Tindal*, "that upon such a contract, the defendant *Lewis* would be entitled to the full enjoyment of the vessel, for himself and his party, free from the intrusion of any stranger. The circumstances of the case, and the object of the voyage, necessarily imply it; so that if the captain afterwards admitted any other passengers, for hire or freight, to *Richmond* (as in fact he did admit the plaintiff) such admission would amount to a breach of contract between him and *Lewis*, for which the latter might have recovered a compensation in damages. But the question here is, whether, under this contract, *Lewis* had such an exclusive possession of the vessel, as would justify him in forcibly putting the plaintiff out of the vessel, admitted, as he had been, by the captain, in defence of his possession; and we think he had not. Here there was no express contract for the exclusive possession of the vessel by *Lewis*, and there could be no object or purpose in considering the vessel as taken out of the possession of the owners, and put into the possession of *Lewis*. All that the defendant *Lewis* bargained for, was, that he and his party should be carried by the captain and the crew on board the *Adelaide*, to *Richmond*, without the

addition of strangers ; and such a contract might be well carried into effect, without considering the possession changed from the owners to *Lewis*. The captain and the crew who continued in the management of the vessel, were the servants of the owners, not of *Lewis*. There were some parts of the vessel manifestly not in the possession of the defendant *Lewis*, and some parts to which he had even no right of access or entry, such as the parts occupied by the crew, the room containing the machinery, and the like. If the captain had carried goods to *Richmond* for other persons, to any extent short of incommoding the defendant *Lewis*, and his friends, the defendants could not have prevented it, either by removing the goods, or by action against the owners, all which considerations tend to show the possession was never given up. The merely putting *Lewis* in possession of the vessel would have been nothing, the main part of the contract remained to be performed by the captain and crew, viz., the carrying them to *Richmond* and back again, for which purpose, it was essential they should remain on board, and retain the management and conduct of the vessel. Looking, therefore, at the object and intention of all parties, we think the exclusive possession of the vessel did not pass to the party hiring the vessel, for the limited purpose of being carried to *Richmond* and back, and consequently that the plea is not established."

"Many accidents," said Lord *Tenterden*, "have occurred from the negligent management of vessels, hired and chartered for a voyage on the ocean, to carry such goods as the charterer may think fit to load, and such only, and many actions have been brought against their owners, but I am not aware that any has ever been brought against the charterer though he is, to some purposes, the *dominus pro tempore*"(k). "If any injury," said *Tindal*, C. J., in the case of *Dean v. Hogg* "had been occasioned by the vessel, the owners, and not *Lewis*, would have been answerable for the damages."

These *dicta* must be understood with reference to the circumstances under the consideration of those learned judges, on the occasion of their delivery. They are the expressions of a rule of general, but not of universal, application. The true question in all such cases is, *whose* servants had the direction and management of the vessel at the time of the injury complained of, and, as on the construction of the great majority of charter-parties, the

(k) *Laughor v. Pointer*, 5 B. & C. 578.

master and crew will be considered to be the servants of the owner; he will, in most cases, be held responsible for injuries occasioned by their negligence or unskilfulness. In the case of *Fletcher v. Braddick* (1), the owners had let their ship for six months, by a charter-party, to the commissioners of the navy, who had put on board a commander in the navy, who had the command of the ship, and also a King's pilot who gave orders to the seamen. The charter-party contained covenants on the part of the owners, that they would provide a crew, and pay, and maintain them; that they would repair the ship and supply her with stores; but the guns and ammunition were to be found by the government, and that the master should obey the orders and instructions of the naval commander. On the part of the commissioners, there was a covenant to pay a certain freight, and if the ship was destroyed by the enemy, that the government should pay for the loss or injury. The action was brought against the owners for running down the ship of the plaintiffs during the time of the hiring. On this case the Court of Common Pleas gave judgment for the plaintiffs, and said, "Notwithstanding the charter-party entered into between the owners and the commissioners of the navy, the ship belonged to the defendants. It was navigated by a master and sailors provided by them, and it is sufficient to say that it is to be considered as their ship with regard to all the world, except the commissioners of the navy."

This decision is not perfectly satisfactory. It was stipulated by the charter-party that the master and crew should obey the orders of the naval commander who was appointed by the crown, and who certainly was not the servant of the owners. Chief Justice *Mansfield* said, "it was doubtful whether, by obeying the orders of the officer, it was meant that the officer *should see to the navigation and direct the motion of the ship*, or only direct to what place the ship should be carried for the purpose of being employed against the enemy." The case was hardly ripe for judgment until that doubt had been removed.

The recent case of *Fenton v. The Dublin Steam Packet Company* was decided, upon grounds more clear and intelligible. It was an action against the owners of a steam packet for an injury done to the plaintiff's keel, through the negligence of the crew of the steam packet.

(1) 2 New Rep. 182.

The declaration alleged, that the defendants^s were possessed of the steam vessel, and by their servants and mariners had the care, direction, and management of the same, and this allegation was put in issue by the plea. The vessel, when the misfortune occurred, was employed under the following memorandum of charter-party :—

“ It is this day mutually agreed between the *City of Dublin Steam Packet Company*, owners of the steam vessel, on the one part, and *John Dails*, &c. on the other part, that the said company agree to charter with *J. D.*, the said steamer for the space of six months, to be paid for at the same and after the rate of £20 per week, the owners to keep the vessel in good and sufficient order for the conveyance of goods, merchandise, and passengers, to run from *Newcastle* and *Goole* or any other coasting station which the said *J. D.* may from time to time employ the said vessel in ; the said *J. D.* to pay all disbursements incident to the working the said steamer, including harbour dues, pilotages, seamens' and captain's wages, and provide coals and oil, tallow, &c. for engines, and to insure the vessel for £3000. The policy to be deposited with the company before named.”

The captain of the steam vessel proved that himself, the crew, and engineers were appointed by the defendants or their agents, but that they were all paid by *Dails* the charterer ; that he obeyed the orders of *Dails* as to where the vessel was to go, *but not as to the mode of navigation* ; that at the time of the accident, *Dails* was on board, and that the vessel was going, by his direction, to Newcastle.

On these facts it was contended, that the vessel was demised to the charterer ; that the crew were his servants, and, therefore, that he, and not the owners, must be liable for their negligence. But the Court was of a different opinion. “ It is conceded,” said Mr. Justice *Patteson*, “ that the accident happened through the negligence of the crew, so that the real question is, whose servants were they ? Looking at the charter-party itself, I have no doubt they were the servants of the owners of the vessel. The charterer is to pay disbursements, but is not required to provide any thing ; he is to pay wages, but is not required to appoint servants ; the inference is, that the owners were to provide every thing, and to have servants of their own choosing.”

The question, therefore, whether the owner or the charterer be liable for injuries caused by the negligence or unskilful management

of the vessel, is to be determined by the terms of the instrument of charter, as explained by the circumstances of each particular case. A charter-party, as we have seen, may be, and most commonly is, a mere contract to carry goods; it may be a contract for the hire of a ship manned and equipped for mercantile adventure; or it may be what it very rarely is, a lease of the hull of a ship, to be navigated by a master and mariners hired and paid by the charterer. In the first case, no doubt can exist that the crew remain the servants of the owner. In the second, a possession subservient to the employment of the vessel by the charterer, and a control over the mode of her navigation may still be retained by the owner, through his servants, the master and mariners, whose services he has let with the ship, and for whose negligence or unskilfulness he is responsible. But if the case should occur of an injury done by the negligent or unskilful management of a ship, the possession and control of which had so completely passed to the charterer, that he appointed the master and crew, and directed not only her destination and employment, but the mode of her navigation, then he, and not the absolute owner, would be held responsible for the misfortune. §

CHAPTER THE SECOND.

OF PROPERTY IN BRITISH SHIPS.

1. ALL commercial nations have, for the advancement of their individual prosperity, conferred various privileges of trade upon the ships belonging to their own countrymen ; and the legislature of this nation has, for the same purpose, at different periods, enacted laws suitable to the circumstances of the times, requiring for the exercise of some particular branches of commerce, ships, not only of the property of its own subjects, but also of the built of its own dominions ; allowing other branches to ships the property only of its own subjects, without regard to the built ; and, in others, in which foreign ships were suffered to participate, favouring those of its own subjects by a difference in the rate of duties. It has, however, at all times, been the policy of the legislature to confine the privileges of our trade, as far as was consistent with the extent of it, to ships built within the King's dominions ; but it was reserved for the reign of George the Third to see the ship-building of the country advanced to such a state as to warrant the confinement of these privileges exclusively to ships of that description, or taken as prize in war. And, accordingly, this measure was carried into execution by a statute, the 26 Geo. 3, c. 60, reserving, however, to such foreign built ships, as were *then* the property of his subjects, the privileges to which they were then entitled by the existing laws. For the more effectual execution of this important measure of public policy, various new regulations were at the same time introduced to ascertain the built and property of ships, which were afterwards improved by subsequent statutes (a), as experience shewed that some particulars, notwithstanding the great attention paid to the original statute, and the great talents employed in framing it, had not been sufficiently provided for by it.

(a) 27 Geo. 3, c. 19 ; 34 Geo. 3, c. 42 & 68 ; 35 Geo. 3, c. 58 ; 37 Geo. 3, c. 63.

The great, and perhaps, the only original object of these statutes, was to advance the public policy of the state, by the notoriety of property obtained through the medium of a public register, a measure adopted with numerous improvements from the wisdom of former times (*b*). They were often, and upon the whole, perhaps truly, considered beneficial in another point of view, namely, as calculated to prevent the commission of private fraud upon individuals; but the instances, in which fair and honest transactions are rendered unavailable through a negligent want of compliance with the forms directed by these and other statutes requiring a public register of conveyances, make the expedience of all such regulations, considered with reference to private benefit only, a matter of question and controversy. It happened also with regard to these statutes, as to all others of a similar kind, that doubts and difficulties arose upon their construction, and upon the application of general rules and enactments to particular cases. The matters to be provided for were very numerous and very various; the difficulty of framing positive regulations, even for objects of a limited nature, is much greater than those, who

(*b*) The registering of ships appears to have been first introduced into practice in this country by the Navigation Act, 12 Car. 2, c. 18, s. 10, A.D. 1660, for it is not mentioned in the Navigation Ordinance in the time of the usurpation; but the statute of Charles the Second only requires foreign ships British owned to be registered. The statute 7 & 8 Wm. 3, c. 22, s. 17, requires British or Plantation built ships British owned, if intended to be employed in the Plantation trade, and also prize ships, to be registered. And ships, for which Mediterranean passes were wanted, were also registered in consequence of a regulation at the Admiralty, although a register was not required by statute for British ships employed in the Mediterranean trade, as we learn from Reeve's History of the Law of Shipping and Navigation, p. 423. Louis the Fourteenth, by an ordinance dated the 24th October, 1681, required all his subjects to make a declaration in the admiralty of their residence, of all ships belonging to them, whether built in France or foreign countries, and of the

names of the several part-owners, who were to be Frenchmen only, and resident in France, in order to preserve the privileges of the national flag to his own subjects. See Valin on the French Ordinance, tom. i. 564, &c. The first article of the Hanseatic Ordinance of 1614, prohibits the building of ships in the Hanse Towns to all except citizens and persons having the particular permission of the magistrates of the place. An act of Congress, of the 31st of December, 1792, ch. i. contains regulations for registering ships in the United States of America, the greater part of which correspond almost exactly with those of our statute of 26 Geo. 3, c. 60. The national privileges of trade are confined to ships belonging to and commanded by citizens of America, and either built within the United States, or belonging to American citizens, on the 16th of May, 1789, and continually thereafter, or taken and condemned as prize in war; or forfeited for a breach of the laws of the United States.

have not tried the experiment themselves, or attended with candour to the experiments of others, are ready to admit. It will often happen, that defects can be discovered, and inconvenience manifested, by experience alone. After an experience of somewhat more than thirty years, it was thought advisable to make many alterations, and to comprise the whole subject in one statute; and, accordingly, all the former acts were repealed, and a new statute passed in the fourth year of the reign of George the Fourth, which took effect for general purposes on the 1st of *January*, 1824 (c). In the sixth year of the same reign, all the statutes relating to the customs were repealed, in order to bring the whole of that extensive and complicated subject into a very few acts (d); and it was considered, that by this measure the Register Act of the the fourth year of that reign was virtually repealed. A new act (e) was accordingly passed, which, (with two or three slight alterations introduced in the next year) was the law for the registry of *British* ships when the last edition of this work was published. Since that time, the 3 & 4 Wm. 4, c. 55, has been passed, and with some few modifications is now in force.

The act of the *sixth* year of the reign of George the Fourth does not appear to differ from that of the *fourth* year, except by the introduction of two additional clauses relating to the repairs and manning of *British* ships, introduced to prevent the bad effects of combinations among shipwrights and seamen. These clauses, which were intended to counteract a temporary evil, have not been re-enacted by the 3 & 4 Wm. 4, and that statute differs from the two preceding ones, by substituting declarations for oaths in cases where the latter had been required, and in other less important matters. By the 5 & 6 Wm. 4, c. 56, so much of 3 & 4 Wm. 4, c. 55, as relates to the mode of ascertaining the tonnage of vessels is repealed, and new rules are established for that purpose.

The most important points of difference between the regulations of the late statutes and the former, are, That it is no longer ne-

(c) 4 Geo. 4, c. 41.

(d) Four hundred and forty-five acts, and parts of acts, were expressly repealed by the 6 Geo. 4, s. 105, and the whole matter, including the registry of ships, comprised in eleven acts, viz., from c. 106 to 116 inclusive. In the next year,

however, five of the repealed acts were revived, a few other acts repealed, and some few amendments made to the eleven acts before mentioned, by the statute 7 Geo. 4, c. 48.

(e) 6 Geo. 4, c. 110; 7 Geo. 4, c. 48.

cessary to recite the certificate of registry in a *contract* for the sale of a ship; and that in a bill of sale or other instrument intended to operate as a transfer of the property, it is sufficient to recite the principal contents of the certificate, and a provision is introduced, with a view to prevent the effect of certain errors in the recital (*f*): That the indorsement on the certificate is to be made by the public officers, instead of the party transferring (*g*): That a mortgagee or trustee for the payment of debts, is not to be deemed an owner (*h*), nor his interest to be affected by the subsequent bankruptcy of the mortgagor or assignor, on the ground of reputed ownership (*i*): That the specific share of every part-owner (and which is required to be one or more 64th parts) must be mentioned in the registry, except in the case of partners in trade, whose interest is to be considered as partnership property (*k*): That only thirty-two persons shall be entitled to be legal owners as tenants in common, with a provision for the equitable title of minors, legatees, creditors, &c., and a provision also for joint-stock companies (*l*); that more extensive powers are given for a registry *de novo*; and that copies of declarations and entries in the books of the Custom-house are made evidence, in order to prevent the necessity of the attendance of the public officers to produce the originals (*m*).

An enumeration of the commercial privileges of *British* ships, does not properly belong to this Treatise; but as they are now comprised in one statute, 3 & 4 Wm. 4, c. 54 (*n*), some parts of which it will be necessary to quote, it has been thought advisable to print the whole of it in the Appendix.

The object of the Legislature is to confine the privileges of *British* ships, to ships duly registered. This appears not only by the Register Act, but also by the Navigation Act (*n*). By the Register Act, it is enacted, That in case any ship, not being duly registered, and not having obtained such certificate as in that act is mentioned, which is the same as the certificate in the 34th Geo. 3, shall exercise any of the privileges of a *British* ship, the same shall be subject to forfeiture, and may be seized by any officer of the Customs, with a saving, however, of the privileges of ships

(*f*) 3 & 4 Wm. 4, c. 55, s. 31.

(*g*) Sect. 34.

(*h*) Sect. 42.

(*i*) Sect. 43.

(*k*) Sect. 32.

(*l*) Sect. 33.

(*m*) Sect. 10.

(*n*) 3 & 4 Wm. 4, c. 54, s. 12, &c.

registered prior to the commencement of this¹ act, under the provisions of the 6 Geo. 4, c. 110. And by the Navigation Act, it is enacted, That no ship shall be admitted to be a *British* ship, unless duly registered and navigated as such (o).

But from this general enactment are excepted, first, *British*-built boats or vessels under fifteen tons burthen, wholly owned and navigated by *British* subjects, which, although not registered as *British* ships, shall be admitted to be *British* vessels, in all navigation in the rivers and upon the coasts of the United Kingdom, or of the *British* possessions abroad, not proceeding over sea, except within the limits of the respective colonial governments, within which the managing owners of such vessels respectively reside. Secondly, *British*-built boats or vessels wholly owned and navigated by *British* subjects, not exceeding the burden of thirty tons, and not having a whole or a fixed deck, and being employed solely in fishing on the banks and shores of *Newfoundland*, and of the parts adjacent, or on the banks and shores of the provinces of *Canada*, *Nova Scotia*, or *New Brunswick*, adjacent to the Gulf of *St. Lawrence*, or on the north of *Cape Canso*, or of the islands within the same, or in trading coastwise within the said limits, which shall be admitted to be *British* boats or vessels, although not registered, so long as such boats or vessels shall be solely so employed (p). Thirdly, ships built in the *British* settlements at *Honduras*, and owned and navigated as *British* ships, which shall be entitled to the privileges of *British* registered ships, in all direct trade between the United Kingdom or the *British* possessions in *America*, and the said settlements; provided the master shall produce a certificate, under the hand of the superintendent of those settlements, that satisfactory proof has been made before him that such ship (describing it) was built in the said settlements, and is wholly owned by *British* subjects: provided also, that the time of the clearance of such ship from the said settlements for every voyage, shall be indorsed upon such certificate by such superintendent (q).

From the language of the foregoing enactments, it does not appear that any ship is *absolutely* required to be registered; the register is necessary only for the purpose of conferring the privi-

(o) 3 & 4 Wm. 4, c. 54, s. 12, &c.

(q) Sect. 14.

(p) Sect. 13.

leges of a *British* ship: the forfeiture is only for exercising the privileges of a *British* ship, without having obtained a certificate. Under the former statutes, it was decided, that a foreign built ship might legally be owned by *British* subjects, and employed by them in the same trade in which such a ship might be employed by aliens (*r*). That case arose upon the convoy Act (*s*), which contained an exception of ships not required to be registered. It does not appear that any question was made as to the legality of the voyage as depending on the cargo; the alien duties had been paid. The legality of the voyage in which *British* subjects may, as owners, employ a foreign built ship, will depend upon the particular voyage, and the cargo, with reference to the Navigation Act (*t*), of which one of the general enactments is, "That no ship shall be admitted to be a ship of any particular country, unless she be wholly owned by subjects of that country, usually residing therein, or under the dominion thereof" (*u*).

I shall now proceed to abstract the enactments of the last Register Act, and shall endeavour to arrange them in such a manner as to present the subject to the reader in a more lucid form than it appears in the statute, introducing or noticing such of the decisions on the former statute as seem applicable to or illustrative of the present, and omitting all those whether quoted in the former editions of this book, or decided since, which were pronounced upon points not likely to arise again. And I propose to mention, 1. What ships are entitled to become and continue registered ships. 2. What persons may be registered as owners. 3. By what officers registry is to be made. 4. At what place registry is to be made. 5. What ships must be registered under the new Act, and at what time. 6. How the tonnage is to be ascertained. 7. What is to be specified in the certificate. 8. Regulations for the preservation of the ship's name. 9. Requisites on the part of the owners to obtain a registry. 10. Regulations concerning the transfer of property in the ship. 11. Requisites on a change of the master. 12. When and how registry *de novo* is to be made. 13. In what cases a temporary certificate or license may be granted. 14. Penalty for detention of the certificate. 15. Evidence of affidavits and books

(*r*) Long v. Duff, 2 Bos. & Pull. 209.

4 B. & A. 426.

(*s*) 43 Geo. 3, c. 57.

(*u*) 3 & 4 Wm. 4, c. 54, s. 15.

(*t*) See Campbell and others v. Innes,

of registry. 16. Power of governors of colonies to stay suits. 17. Punishment for false oaths or documents.. 18. Recovery and application of penalties.

And first—

*What ships are entitled to become and continue
Registered Ships.*

Ships entitled to be registered, are those only which are wholly of the built of the United Kingdom, or of the *Isle of Man*, or of *Guernsey* or *Jersey*, or of some of the colonies, plantations, islands or territories, in *Asia*, *Africa* or *America*, or of *Malta*, *Gibraltar* or *Heligoland*, belonging to his Majesty at the time of the building of such ships; or ships condemned in a Court of Admiralty as prize of war; or condemned in any competent court as forfeited for a breach of the laws made for the prevention of the slave-trade; and which belong to his Majesty's subjects, duly entitled to be owners of registered ships (*v*). But ships once registered, lose the privileges of *British* ships in three instances. As, first, a ship deemed or declared to be stranded or unseaworthy, and incapable of being recovered or repaired to the advantage of the owners, and for such reasons sold by order or decree of any competent court for the benefit of the owners, or other persons interested, shall be deemed to be lost or broken up, and never again entitled to the privileges of a *British*-built ship (*w*). Secondly, A *British* ship captured by and become prize to an enemy, or sold to foreigners, shall not again be entitled to the privileges of a *British* ship, unless condemned in a Court of Admiralty as prize of war, or in any competent court for a breach of the laws made for the prevention of the slave trade (*x*). Thirdly, No ship shall continue to enjoy the privileges of a *British* ship after repair in a foreign country, if such repairs shall exceed the sum of 20*s.* per ton, unless such repairs shall have been necessary by reason of extraordinary damage sustained during her absence from the King's dominions, to enable her to perform her voyage and return; and on arrival, the master is required, upon her first entry, to report upon oath to the collector or comptroller of the Customs at the port of entry, that she had been so repaired, under penalty of 20*s.* per ton; and if it be proved to the satisfaction of the commissioners,* that the ship was seaworthy when she

(*v*) 3 & 4 Wm. 4, c. 55, s. 5.

(*w*) Sect. 8.

(*x*) Sect. 9.

last departed from his Majesty's dominions, and that no greater quantity of such repairs have been done than was necessary, the Commissioners may direct the collector and comptroller of the port at which she arrived, or where she may then be, to certify on the certificate of her registry, that it has been proved to the satisfaction of the commissioners of his Majesty's Customs, that her privileges have not been forfeited, notwithstanding the repairs done in a foreign country (y).

The privilege of a *British* ship appears to have been first given by the statute, 4 Geo. 4, c. 41, s. 5, to a ship condemned for breach of the laws made for the prevention of the slave-trade. Under the former Register Acts, it was decided, that such a ship could not be considered as prize of war, although the Judge of the Court of Vice-Admiralty, in which she was condemned, had certified that she was condemned as lawful prize (z).

2. *What Persons may be registered as Owners.*

The owners must be subjects of *Great Britain* (a). No foreigner may, directly or indirectly, have any part or share in the ship (b). No person may be an owner of any ship authorized to be registered, who has taken the oath of allegiance to any foreign state, except under the terms of some capitulation, unless he shall afterwards become a denizen or naturalized subject of the United Kingdom; nor any person usually residing in any country not under the dominion of His Majesty, unless he be a member of some *British* factory, or agent for or partner in a house or co-partnership, actually carrying on trade in *Great Britain* or *Ireland* (c). But no greater number than thirty-two persons are entitled to be legal owners at one and the same time as tenants in common, or to be registered as such. This, however, is not to affect the equitable title of minors, heirs, legatees, creditors, or others, exceeding that number, duly represented by or holding from any of the persons within the said number, registered as legal owners of any shares. And if it shall be proved to the satisfaction of the Commissioners of the Customs, that any number of persons have associated themselves as a joint-stock com-

(y) 3 & 4 Wm. 4, c. 55, s. 7.

(z) *The King v. Collector and Comptroller of the Customs of London*, 1 Maule & Selwyn, 262.

(a) Sect. 5.

(b) Sect. 13.

(c) Sect. 13.

pany, for the purpose of owning any ship or ships, as the joint property of such company, and that such company have duly elected or appointed any number, not less than three of the members of the same, to be trustees of the property in such ships; such trustees, or any three of them, may, with the permission of the commissioners, make and subscribe the declaration required by the Act, before registry be made, except that instead of the names and descriptions of the other owners, they shall state the name and description of the company to which the ship shall belong (c).

The Act also requires the property to be considered as divided into sixty-four parts, and the proportion held by each owner to be described in the registry, as being a certain number of sixty-fourth parts; and no person is entitled to be registered as an owner of any proportion not being an integral sixty-fourth part; but as it might happen that existing property could not be reduced by division into any number of integral sixty-fourth parts, the owners of other fractional parts are allowed to transfer their shares without stamp duty, and their right to such fractional parts is not to be affected by reason of their shares not having been registered; and any number of owners named and described in the registry, being partners in any house or co-partnership, actually carrying on trade in any part of his Majesty's dominions, may hold any ship or share thereof, in the name of their house or co-partnership, as joint owners thereof, without distinguishing the proportionate interest of each of such owners; and such ship or share thereof so held in co-partnership, shall be deemed to be partnership property, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property (d).

The language of the 13th section, before quoted, is not precisely the same as that of the old statute, the words of which are, "no subject of his Majesty, whose usual residence is in any country not under the dominion of his Majesty, shall be deemed or entitled, during the time he shall continue so to reside, to be the owner, in whole or in part, of any *British* ship authorized to be registered by that Act, unless, &c." (e). Under that statute it was held, that an occasional residence for the purpose of obtaining

(c) 3 & 4 Wm. 4, c. 55, s. 33.

(e) 26 Geo. 3, c. 60, s. 8.

(d) Sect. 32.

a colourable qualification would not give a title; that no person was entitled who had not his *usual* residence in *Great Britain*, or in the dominions belonging to the crown, unless he was within some of the exceptions; that if a man went to another country, and there had a more usual residence than in this, he was no longer entitled to the same privileges, and that a person who was continually shifting his residence between the *British* dominions and the *American* states, so as not to have what under any extension could be deemed an usual residence in the *British* dominions, did not come within the description of the statute (f).

It will be observed, that the 33d section before quoted, contains a proviso in favour of the equitable title of the persons, and under the circumstances therein mentioned. Under the former statutes, Lord Chancellor *Eldon* took notice of the difference between an equitable title set up under the act or contract of parties and trusts arising by operation of law, or the act of God. The latter he considered as being out of the operation of the statutes, the former as being restrained by it (g).

The 32d section, before quoted, contains a provision regarding partners in trade, allowing them to be joint owners, and making their property partnership property, both at law and in equity; and it seems that such partners are to be considered as one person only, in estimating the number of thirty-two persons, mentioned in the 33d section, which speaks of tenants in common; probably, also, the name of each partner must be mentioned and described in the registry; the safer mode certainly will be to name them all in the registry, and this will be the most effectual mode of showing that the whole interest is *British*. Under the former statutes, it was held, that property in a ship, although bought with partnership money, if registered in the names of one or more only of the partners, must be considered, both at law and in equity, as being the property of those only who were named in the registry (h). And accordingly, in cases of bankruptcy, the value of such property was distributed among the separate creditors of the persons named in the registry, and not among the

(f) By Lord Stowell, in the case of the *Eleanor*, Hall, 1 Edwards, 135.

(g) See 6 Vesey, jun. 739; 15 Vesey, jun. 68.

(h) See the case of *Camden v. Anderson*, 5th Term Reports, 709; *Curtis and*

Perry, 6th Vesey, jun. 739; *Yallop ex parte*, 15 Vesey, jun. 60; *Houghton ex parte*, and *Gribble ex parte*, 17 Vesey, jun. 251; *Mestaer v. Gillespie*, 11 Vesey, 625, 642; *Speldt v. Lechmere*, 13 Vesey, 588; *Brewster v. Clarke*, 2 Mer. 75.

joint creditors of the whole partnership; and the same law must, as I apprehend, still prevail, unless partnership property be duly registered according to the requisites of the new Act.

3. By what Officers Registry is to be made.

The persons authorised and required to make registry, and grant certificates, in respect of ships, to be registered in the following countries, &c., are,—

The collector and comptroller of his Majesty's customs in any port in the United Kingdom of *Great Britain* and *Ireland*, and in the *Isle of Man*, respectively, in respect of ships there to be registered.

The principal officers of his Majesty's customs in the island of *Guernsey* or *Jersey*, together with the governor, lieutenant-governor, or commander-in-chief of those islands respectively, in respect of ships to be there registered.

The collector and comptroller of his Majesty's customs of any port in the *British* possessions in *Asia*, *Africa*, and *America*; or the collector of any such port at which no appointment of a comptroller has been made, in respect of ships to be there registered.

The collector of duties at any port in the territories under the government of the *East India* Company, within the limits of the charter of the said company, or any person of the rank, in the said company's service, of senior merchant, or of six years' standing in the said service, being respectively appointed to act in the execution of this Act, by any of the governments of the said company, in respect of ships or vessels to be there registered.

The collector of duties at any *British* possession within the said limits, and not under the government of the said company, and at which a custom-house is not established; together with the governor, lieutenant-governor, or commander-in-chief of such possession, in respect of ships to be there registered.

The governor, lieutenant-governor, or commander-in-chief of *Malta*, *Gibraltar*, *Heligoland*, and *Cape of Good Hope* respectively, in respect of ships there to be registered.

Provided always, that no ship or vessel be registered at *Heligoland* except such as is wholly of the built of that place; and that ships or vessels, after having been registered at *Malta*,

Gibraltar, or Heligoland, shall not be registered elsewhere; and that ships or vessels registered at *Malta, Gibraltar, or Heligoland*, shall not be entitled to the privileges and advantages of *British* ships in any trade between the said United Kingdom and any of the *British* possessions in *America*.

Provided also, that wherever in and by this Act it is directed or provided that any act, matter, or thing, shall and may be done or performed by, to, or with any collector or comptroller of his Majesty's customs, the same shall or may be done or performed by, to, or with the several persons respectively hereinbefore authorised and required to make registry, and to grant certificates of registry as aforesaid, and according as the same act, matter, or thing is to be done or performed at the said several and respective places, and within the jurisdiction of the said several persons respectively.

Provided also, that wherever in and by this Act it is directed or provided that any act, matter, or thing shall or may be done or performed by, to, or with the commissioners of his Majesty's Customs, the same shall or may be done or performed by, to, or with the governor, lieutenant-governor, or commander-in-chief of any place where any ship or vessel may be registered under the authority of this Act, so far as such act, matter, or thing can be applicable to the registering of any ship or vessel at such place (i).

The old Register Acts contained no provision for registering ships in the territories under the government of the *East India* Company; and there being no officers of his Majesty's customs in those territories, there was no person who could make registry there. This omission appears to have been first supplied by the 55 Geo. 3, c. 116. Before the passing of that statute, a person, for whom a ship was building in *India*, invited another to take one-sixteenth share, who consented to do so, and paid a large sum of money toward the price thereof, which however was never finally ascertained. The ship afterwards came to *England*, and was there registered by the person for whom she was built, in the names of himself and another, omitting the name of the person who had agreed to take the sixteenth. Upon a question afterwards arising between this person and the executors of the other, it was held, that he had no legal interest in the ship (j).

(i) 3 & 4 Wm. 4, c. 55, s. 3.

(j) *Striuger v. Murray and others*, 2 B. & A. 248.

4. *At what place Registry is to be made.*

Ships built at *Malta, Gibraltar, or Holland*, are to be respectively registered at those places (*k*). No registry shall be made, or certificate thereof granted, in any other port or place than that to which the ship shall properly belong, except so far as relates to such ships as shall be condemned as prizes in any of the islands of *Guernsey, Jersey, or Man*, which ships shall in future be registered in manner after mentioned; but that every registry and certificate granted in any port or place to which any such ship does not properly belong, shall be utterly null and void to all intents and purposes, unless the officers shall be specially authorised to make such registry and grant such certificate in any other port, by an order in writing, under the hands of the commissioners of his Majesty's customs; and at every port where registry shall be made in pursuance of the Act, a book shall be kept by the collector and comptroller, in which all the particulars contained in the form of the certificate, as by this Act directed to be used, shall be duly entered; and every registry shall be numbered in progression, beginning the enumeration at the commencement of every year; and the collector and comptroller shall forthwith, or within one month at the farthest, transmit to the commissioners of customs a true and exact copy, together with the number of every certificate which shall be by them so granted (*l*).

Every ship shall be deemed to belong to some port at or near to which some or one of the owners, who shall take and subscribe the oath required by this Act, before registry be made, shall reside (*m*).

Ships taken and condemned as prize or forfeiture, are to be registered either at *Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven* (*n*).

5. *What Ships must be registered under the new Act, and at what time.*

From and after the commencement of this Act (viz., 5th Jan. 1826), or from and after the first arrival and entry of any ship after such commencement, at the port to which she belongs, or at any other port in the same part of the United Kingdom, or in the same colony, plantation, island, or territory, no certificate of re-

(*k*) 3 & 4 Wm. 4, c. 55, s. 3.

(*l*) Sect. 10.

(*m*) Sect. 11.

(*n*) Sect. 30.

gistry shall be in force, except such as shall be granted under the authority of this Act, or which shall have been granted under the authority of the Act in the 4th year of the reign of his present Majesty, and in which the share or shares, as in this Act described, held by each owner, shall be set forth, unless it shall be certified thereon by the collector and comptroller of the port to which such ship belongs, that farther time has been granted by the commissioners of customs for ascertaining and registering the number of such shares as cannot then be ascertained (o).

No ship or vessel shall be entitled to any of the privileges or advantages of a *British* registered ship unless the person or persons claiming property therein shall have caused the same to have been registered in virtue of the said recited Act (6 Geo. 4, c. 110), or of 4 Geo. 4, c. 41, or until such person or persons shall have caused the same to be registered in manner hereinafter mentioned, and shall have obtained a certificate of such registering from the person or persons authorised to make such registry and grant such certificate as hereinafter directed (p).

Upon the first registry, in compliance with the 6 Geo. 4, c. 110, of any ship previously registered, no stamp duty shall be charged upon the bond; and if the certificate of such former registry then delivered up shall have a *Mediterranean* pass attached thereto, no stamp duty shall be charged on account of the new *Mediterranean* pass (q).

6. *How the Tonnage is to be ascertained.*

On this subject the reader is requested to refer to the 5 & 6 Wm. 4, c. 56, printed in the Appendix (r).

7. *What is to be specified in the Certificate.*

The certificate specifies the name, occupation, and residence of every owner in the proportions mentioned on the back of it, the name of the ship, the place to which she belongs, her tonnage, the name of the master, the time and place of the built or of condemnation, the name of the surveying officer, the number of decks

(o) 6 Geo. 4, c. 110, s. 35.

(p) 3 & 4 Wm. 4, c. 55, s. 4.

(q) 6 Geo. 4, c. 110, s. 36.

(r) In the old system, the tonnage was determined by reference only to a ship's length and breadth, which led to vessels being built of a disproportionate depth,

in order that their registered tonnage, and the charges depending upon it, might be diminished as much as possible. By the act now in force, the tonnage is fairly determined according to the capacity of the ship.—Macculloch, Dictionary of Commerce, Supplement, Ships.

and masts, the length, breadth, height between decks, if more than one, or depth of the hold, if only one deck, whether rigged with a standing or running bowsprit, the description of her stern, whether carvel or clinker built, and gallery, and kind of head, if there be any. And on the back are indorsed the names of the several owners, with the number of sixty-fourth shares held by each (r).

8. *Preservation of the Ship's Name.*

It shall not be lawful for any owners to give any name to a ship other than that by which she was first registered. The owners of every registered ship shall, before the ship, after such registry, shall begin to take in any cargo, paint in white or yellow letters, of a length not less than four inches, upon a black ground, on some conspicuous part of the stern, the name by which the ship shall have been registered pursuant to this Act, and the port to which she belongs, in a distinct and legible manner, and shall so keep and preserve the same, under a penalty of 100*l.* for permitting the ship to begin to take in any cargo before the name has been painted, or for wilfully altering, erasing, obliterating, or in anywise hiding or concealing the name (unless in the case of square-rigged vessels in time of war), or for describing her in any written or printed paper, or other document, by any name other than that by which she was first registered, or for verbally describing the ship by any other name to any officer of his Majesty's revenue in the due execution of his duty (s).

9. *What is required on the part of the Owners to obtain the Registry.*

No registry is to be made, or certificate granted, until a declaration be made and subscribed in the form set forth in the statute. This declaration, in the case of individuals, is to be made by the owner, if only one; if two owners, and both resident within twenty miles of the place of registry, by both; if both or either resident at a greater distance, by one only; if more than two owners, by the greater part, not exceeding three, if resident within twenty miles, unless a greater number shall be desirous to join in making the declaration; or by one, if all, or all except one, are resident at a greater distance; and if the required number do not attend, a declaration must further be made by such as do attend, that the

(r) 3 & 4 Wm. 4, c. 55, s. 2.

(s) Sect. 24

absent are not resident within twenty miles, and have not wilfully absented themselves, to avoid making the declaration, or are prevented by illness from attending. The declaration to be thus made contains the name of the ship, her port, and master, the description of the ship, the name, occupation, and residence of every part owner, with other particulars tending to prove them to be subjects of his Majesty, and concludes with a positive averment, that no foreigner, directly or indirectly, hath any share or interest in the ship. If the ship belong to a corporate body, the declaration is to be made by the secretary or other proper officer of such body, and instead of the names and descriptions of the owners, he is to state the name and description of the company or corporation to which the ship belongs (t).

At the time of obtaining the certificate, a bond must be executed by the master, and such of the owners as personally attend, to be approved of and taken by the person authorised to make the registry, in a penalty varying in proportion to the burthen of the ship, but never exceeding 1,000*l.*; but if the master cannot attend at the time of registry, by reason of the absence of himself and the ship at some other port, a separate bond may be given by him at the port where the ship may then be, which shall be transmitted to the port where the ship is to be registered; and the two bonds shall be of the same effect as if the parties had bound themselves jointly and severally in one bond; and every such bond is to be as a security that the certificate shall not be lent, sold, or disposed of, but solely used for the service of the ship for which it is granted; and in case the ship be lost, captured, or destroyed, or otherwise prevented from returning to the port to which she belongs, or shall have forfeited the privileges of a *British* ship, or been condemned for illicit trading, or have been taken in execution for debt and sold accordingly, or sold to the crown, or have been registered *de novo*, the certificate, if preserved, shall be delivered up within one month after the arrival of the master in any port in his Majesty's dominions, to the collector and comptroller of some port in *Great Britain*, or the *Isle of Man*, or of the *British* colonies, or to the governor and so forth of *Guernsey* and *Jersey*; and if any foreigner shall have purchased or become entitled to the whole or a part of the ship, the certificate must be given up at the time and place mentioned in the statute, which

(t) 3 & 4 Wm. 4, c. 55, s. 13 & 14.

vary according to the different circumstances therein mentioned (*u*).

Every person who shall apply for a certificate, shall produce to the persons authorised to grant it, a true and full account, under the hand of the builder, of the proper denomination, and, of the time when, and the place where, the ship was built; and also an exact account of the tonnage, together with the name of the first purchasers (which account the builder is hereby directed and required to give under his hand, on the same being demanded by the person applying for the certificate); and shall also make and subscribe a declaration before the persons authorised to grant the certificate, that the ship for which the certificate is required is the same with that which is so described by the builder (*v*).

In the case of a prize ship, or of a ship condemned for breach of the laws for the prevention of the slave trade, the owner must produce a certificate of the condemnation, under the hand and seal of the Judge of the Court, and an account, in writing, of all the particulars contained in the form of the certificate of registry, made and subscribed by one or more skilful persons, to be appointed by the court to survey the ship, and must also make and subscribe a declaration of the identity of the ship (*w*).

The property in every ship, of which there are more than one owner, shall be taken and considered to be divided into sixty-four parts or shares; and the proportion held by each owner shall be described in the registry, as being a certain number of sixty-fourth parts or shares; and no person shall be entitled to be registered as an owner in respect of any proportion of a ship, which shall not be an integral sixty-fourth part or share; and upon the first registry, the owners, who shall make and subscribe the declaration required by this Act before registry shall be made, shall also declare the number of such parts or shares held by each owner, and the same shall be so registered accordingly (*x*).

If it shall become necessary to register any ship or vessel *de novo*, and any share or shares of such ship or vessel shall have been sold since she was last registered, and the transfer of such share or shares shall not have been recorded and indorsed in manner hereinbefore directed, the bill of sale thereof shall be produced to the collector and comptroller of his Majesty's customs,

(*u*) 3 & 4 Wm. 4, c. 55, s. 20.

(*v*) Sect. 25.

(*w*) Sect. 29.

(*x*) Sect. 32.

who are to make^(y) registry of such ship or vessel, otherwise such sale shall not be noticed in such registry *de novo*, except as hereinafter excepted: Provided always that upon the future production of such bill of sale and of the existing certificate of registry, such transfer shall and may be recorded and indorsed as well after such registry *de novo* as before (y).

And if upon any change of property in any ship or vessel the owner or owners shall desire to have the same registered *de novo*, although not required by this Act, and the owner or proper number of owners shall attend at the custom-house, at the port to which such ship or vessel belongs for that purpose, it shall be lawful for the collector and comptroller of his Majesty's customs at such port, to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof, the several requisites hereinbefore in this Act mentioned and directed being first duly observed and complied with (x).

§ It has been decided that a shipbuilder who gave to a person for whom he was building a ship, shortly before the actual completion thereof, the builder's certificate, required by the 20th section of the 26th Geo. 3, (and by the 25th section of the present Register Act), in order that his customer might obtain a certificate of registry in his own name (which was accordingly done), had thereby declared that the *general* property of the ship was vested in his customer, but had not thereby lost his right to retain the possession until the residue of the stipulated price was paid (a).

In general, under a contract for building a ship or making anything not existing in specie at the time of the contract, no property vests in the purchaser during the progress of the work, nor until the vessel or thing is finished and delivered, or at least ready for delivery, and approved by the purchaser, even although the contract contains a specification of the dimensions and other particulars of the vessel or thing, and fixes the precise mode and time of payment (b); but in the case of *Woods v. Russell* above cited, it was laid down by Lord Tenterden, that if a ship be built upon a special contract, and it is part of the terms of that contract that given portions of the

(y) 3 & 4 Wm. 4, c. 55, s. 38.

(x) Sect. 39.

(a) *Woods v. Russell*, 5 B. & A. 942.

(b) *Mucklow v. Mangles*, 1 Taunt. 318.

Simmons v. Swift, 5 B. & C. 857.

Roide v. Thwaites, 6 B. & C. 388.

Goode v. Langley, 7 B. & C. 26. *Atkin-*

son v. Bell, 8 B. & C. 277. *Carruthers*

v. Payne, 5 Bing. 270.

price shall be paid according to the progress of the work; part when the keel is laid, part when at the light plank; the payment of those instalments appropriates specifically to the purchaser the ship so in progress, and vests in him a property in that ship, and that as between him and the builder, he is entitled to insist upon the completion of that very ship, and the builder is not entitled to require him to accept any other. In conformity with this opinion the Court of King's Bench, in the recent case of *Clarke v. Spence* (c), decided, that where a purchaser contracted with a shipbuilder to build him a ship for a certain sum, to be paid by instalments as the work proceeded: the first instalment when the vessel was rammed, the second when she was timbered, the third when she was decked, &c., and an agent for the purchaser was to superintend the building, that on payment of the first instalment, the property in the portion then finished, became, by virtue of the contract, vested in the purchaser, subject to the right of the builder to retain such portion for the purpose of completing the work, and earning the rest of the price; and that each material, subsequently added, became, as it was added, the property of the purchaser as the general owner. In a subsequent case (d), it was considered that the contract was executory, for the ship when finished, and therefore that the property in it did not pass while the ship remained in progress and incomplete; but the doctrine laid down in the two former cases was expressly recognized. §

10. *Regulations concerning the Transfer of Property in the Ship.*

And first on a Transfer generally.—When and so often as the property in any ship, or any part thereof, belonging to any of his Majesty's subjects, shall, after registry, be sold to any other of his Majesty's subjects, the same shall be transferred by bill of sale, or other instrument in writing, containing a recital of the certificate of registry, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or equity; but no bill of sale shall be deemed void, by reason of any error in such recital, or by the recital of any former, instead of the existing certificate, provided the identity of the ship therein intended be effectually proved thereby (e).

No bill of sale, or other instrument in writing, shall be valid

(c) 4 Adol. & El. 448.

(e) 3 & 4 Wm. 4, c. 55, s. 31.

(d) *Laidler v. Burlinson*, 2 M. & W. 602.

and effectual to pass the property in any ship, or in any share thereof, or for any other purpose, until it shall have been produced to the collector and comptroller of the port at which the ship is registered, or to the collector and comptroller of any other port at which she is about to be registered *de novo*, as the case may be, nor until such collector and comptroller respectively shall have entered in the book of registry, or of such registry *de novo*, as the case may be, (and which they are respectively by this Act required to do, upon the production of the bill of sale, or other instrument for that purpose,) the name, residence and description of the vendor or mortgagor, or of each, if more than one; the number of shares transferred; the name, residence and description of the purchaser or mortgagee, or of each, if more than one, and the date of the bill of sale, or other instrument, and of the production of it; and further, if such ship is not about to be registered *de novo*, the collector and comptroller of the port where she is registered, are required to indorse the aforesaid particulars of such bill of sale or other instrument, on the certificate of registry of the ship, when it shall be produced to them for that purpose in a prescribed form; and to give notice thereof to the commissioners of Customs; and in case the collector and comptroller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then they are to certify, by indorsement upon the bill of sale or other instrument, that the particulars before-mentioned have been so entered in the book of registry, and indorsed upon the certificate as aforesaid (e).

When the particulars of any bill of sale or other instrument, by which any ship, or any share thereof, shall be transferred, shall have been so entered in the book of registry, the bill of sale or other instrument, shall be valid and effectual to pass the property thereby intended to be transferred, as against all persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees, who shall first procure the indorsement to be made upon the certificate in manner mentioned, in the following clause (f): It is declared by the Act to be the true intent and meaning thereof, that when property has been transferred more than once, the several purchasers and

(e) 3 & 4 Wm. 4, c. 55, s. 34; 7 Geo. 4, c. 48, s. 26.

(f) 3 & 4 Wm. 4, c. 55, s. 35.

mortgagees, when more than one appear to claim the same property, shall have priority, *not according to the respective times when the particulars of the instrument of transfer are entered in the book of registry, but according to the time when the indorsement is made upon the certificate* : and it is enacted, that when and after the particulars of any instrument of transfer shall have been entered in the book of registry, the officers shall not enter in the book the particulars of any other instrument, purporting to be a transfer by the same vendor or mortgagor, of the same ship or share thereof, to any other person, unless thirty days shall elapse from the day on which the particulars of the former instrument were entered in the book ; or in case the ship was absent from the port at the time when the particulars of the former instrument were entered in the book, then unless thirty days shall have elapsed from the day on which the ship arrived at her port. And in case the particulars of two or more instruments shall have been entered, then the officers shall not enter the particulars of any other instrument, unless the like period of thirty days shall have elapsed from the respective days before-mentioned. Whenever an entry has been made in the book of registry of more than one transfer by the same owner of the same property, the officers shall indorse on the certificate the particulars of that instrument of transfer, under which the person claims property, who shall produce the certificate for that purpose within thirty days after the entry of his instrument of transfer, or within thirty days after the ship's return to her port, in case she was absent at the time of the entry of the particulars. And in case no person shall produce the certificate within either of the said spaces of thirty days, then the officers shall indorse on the certificate the particulars of the instrument of transfer, to such person as shall first produce the certificate for that purpose : but if the certificate be lost, mislaid or detained, so that the indorsement cannot in due time be made thereon, on proof of this being made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of customs, they may grant such further time as may to them appear necessary for the recovery of it, or for a registry *de novo* ; and a memorandum of the time so granted shall be made in the book of registry ; and during such time no other bill of sale shall be entered for the transfer of the same ship, or the same share thereof (g).

Thus, in case of successive sales or transfers of the same property, by the same person, each of the rival vendees or mortgagees has thirty days from the entry of his own instrument, or next subsequent return of the ship to port, during which no one but himself can obtain a perfect title. But, after that time has elapsed, if further time be not granted to him, his claim may be defeated by an indorsement of the particulars of some other vendee's instrument on the certificate. If the transfer be by way of mortgage, as the whole property does not pass to the mortgagee, the mortgagor may transfer the portion which remains in him to a second purchaser or mortgagee, in the manner prescribed by the Registry Act; and in a recent case (*g*), it seems to have been considered that an instrument purporting to transfer such residue of interest, and noticing the right of the prior mortgagee, did not entitle the party claiming under it to a priority to such mortgagee, although his transfer may never have been indorsed on the certificate, and all proper formalities may have been complied with in the case of the second mortgage.

If the certificate shall be produced to the collector and comptroller of any port where the ship may then be, after any bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and comptroller of such port, as directed by this Act, the officers of the other ports are to indorse on the certificate (being required so to do) the transfer mentioned in such bill of sale; and they are to give notice thereof to the collector and comptroller of the port to which the ship belongs, who shall record it in like manner as if they had made such indorsement themselves, but inserting the name of the port at which the indorsement was made. But the officers of such other port shall first give notice to the officers of the port to which the ship belongs, of such requisition made to them to indorse the certificate; and the officers of the port to which the ship belongs, shall thereupon send information to the officers of such other port, whether any or what other bill or bills of sale have been recorded in the book of the registry of such ship; and the officers of such other port, having such information, shall proceed, in manner directed by this Act in all respects to the indorsing of the certificate, as they would do if such port were the port to which the vessel belonged (*h*).

(*g*) *Ex parte Jones*, Tyrwh. 686.

(*h*) 3 & 4 Wm. 4, c. 55, s. 37.

If a ship, or the share of any owner who may be out of the kingdom, shall be sold in his absence, by his known agent or correspondent, under his directions, either expressed or implied, and acting for his interest in that behalf, and such agent or correspondent who shall have executed a bill of sale to the purchaser, shall not have received a legal power to execute it, the commissioners of customs may, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as the case may be, as if such legal power had been produced; and if it shall happen that any bill of sale cannot be produced, or if, by reason of distance of time, or the absence or death of parties concerned, it cannot be proved that a bill of sale for any shares in any ship had been executed, and registry *de novo* shall have become necessary, the commissioners may, upon proof to their satisfaction of the fair dealings of the parties, permit such ship to be registered *de novo*, in like manner as if a bill of sale for the transfer of such shares, had been produced. But in any of these cases good and sufficient security shall be given to produce a legal power or bill of sale, within a reasonable time, or to abide the future claims of the absent owner, his heirs and successors, as the case may be, and at the future request of the party whose property has been so transferred, without the production of a bill of sale from him or from his lawful attorney, the bond shall be available for the protection of his interests, in addition to any powers or rights which he may have in law or equity against the ship, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained (i).

Secondly, If made as a Security.—The provisions of the statute respecting the transfer of a ship, or of any shares thereof, as a security for the payment of debt, either by way of mortgage, or of assignment to a trustee for the purpose of sale for the payment of debt, have already been mentioned (j).

We have seen also, that when any such transfer has been made and duly registered, the right or interest of the mortgagee or other assignee is not affected by any act of bankruptcy committed by such mortgagor or assignor, after the time when such mortgage or assignment has been so registered, notwithstanding such

(i) 3 & 4 Wm. 4, c. 55, s. 41.

(j) Sect. 42, and see ante, p. 15.

mortgagor or assignor, at the time he became bankrupt, had in his possession, order, and disposition, and was the reputed owner of the ship or shares so by him mortgaged or assigned; but that such mortgage or assignment takes place of and is preferred to any right, claim, or interest which may belong to the bankrupt's assignee (*k*).

Upon the subject of transfer of property, it seems fit to notice a distinction between the recent and the former statutes. A recital of the certificate of registry is not now made necessary to the validity of an *executory* contract or agreement for the transfer of property, as was expressly required by the 34th Geo. 3, c. 68, s. 14; neither is an indorsement of such a contract on the certificate now required, which was held to be necessary under that statute (*l*); and by the language of the new Acts, if the certificate be not recited in the bill of sale, *the transfer shall not be valid and effectual*, whereas by the 26 Geo. 3, c. 60, s. 17, *the bill of sale* was made void.

The latter difference, however, is probably of no great importance; for under the former statutes, covenants not depending upon the transfer of the property, such as a covenant to pay money for the security whereof a ship had been mortgaged, was held not to be avoided by reason of an omission to recite the certificate (*m*). Whereas covenants depending upon a contract to transfer, such as an agreement to indemnify the seller against expenses, to which he might be liable on account of his interest in the ship, were held to be void in a case where the contract to transfer was invalid (*n*). This distinction between covenants, which, according to their subject, are connected with or dependent upon the transfer, and those which are unconnected with or independent of it, may be found applicable to the new statute.

It will be observed, that by the present Act, it is sufficient to recite in a bill of sale, the principal contents of the certificate of registry; and that the instrument is not to be deemed void for any error in the recital, if the identity of the ship therein intended be effectually proved thereby.

The departure from the language of the old statutes appears to have been intended to prevent the inconvenience that had been experienced by mistakes in the recital of the certificate (*o*), though

(*k*) 3 & 4 Wm. 4, c. 55, s. 43; ante, p. 15.

(*l*) Mortimer and others v. Fleming, 4 B. & C. 120.

(*m*) Kerrison v. Cole, 8 East, 231.

(*n*) Biddell v. Leeder and another, 1 B. & C. 327.

(*o*) See Westerdell v. Dale, 7 Term Rep. 306.

even under them, a mistake apparent upon the face of the instrument was held not to vitiate it (*p*).

It was made a question, under the old Acts, whether in the recital of the certificate of registry, it was necessary to mention the indorsement that had been made upon it (*q*). An indorsement of a transfer made by a bill of sale, cannot be recited in it, because it must be made after the bill of sale; but it may still become a question whether prior indorsements, and especially the indorsement made at the time of granting the certificate, and which is referred to in it, ought not to be recited. The safer way will be to recite it, and thereby avoid questions.

Some parts of the 34th and three following sections, appear to have been intended to obviate questions that had arisen under the former Acts, as to the time at which a bill of sale should be deemed to take effect, to the exclusion of intermediate acts and conveyances, upon which subject there had been much doubt and difficulty (*r*). And by transferring the power of indorsing the transfer on the certificate, from the party making the transfer to the public officers, some part of the inconvenience that had been experienced under the former Acts may possibly be avoided. In the cases of death or bankruptcy, or absence of a vendor, they may certainly be avoided, though perhaps not in all cases of disputes between vendor and purchaser (*s*).

Some of the acts required by the language, as well of the new as of the old statutes, to give validity to a bill of sale, are to be done by the public officers. Under the old statutes, it was held that an omission by the public officers would not invalidate a transfer of the property (*t*).

Under these statutes also, it was decided that their provisions were not confined to the transfer of property to a stranger, but

(*p*) *Rolleston and others v. Smith*, 4 Term Rep. 161.

(*q*) *Cappadoce v. Condor*, 1 Bos. & Pul. 483.

(*r*) See *Moss and others v. Charnock*, 2 East 399; *Moss and another v. Mills and another*, 5 East, 144; *Heath v. Hubbard*, 4 East, 110; *Bloxam and others v. Hubbard*, 5 East, 107; *Hubbard v. Johnston*, 3 Taunton. 177; *Hayton and another v. Jackson and others*, 8 East, 511; *Palmer and another v. Moxon*, 2

M. & S. 43; *Richardson and others v. Campbell and another*, 5 B. & A. 196; *Hodgson and another v. Brown and another*, 2 B. & A. 427.

(*s*) See *Thompson and another v. Smith and others*, 1 Madd. 395; and the cases referred to. See also *Dixon v. Ewart*, 3 Meriv. 322.

(*t*) *Ratchford v. Meadows*, 3 Esp. N. P. C. 69; *Heath v. Hubbard*, 4 East, 110; *Underwood v. Miller and another*, 1 Taunt. 387.

applied also to a transfer by one part owner to another (*u*). This decision appears manifestly applicable to the present statute. A conformity with the statutes was in several cases held requisite to the validity of a bill of sale, intended by way of mortgage or security; and it was held in one case, that although the person to whom the security was given, had the control or the possession of the ship, which was then in a port, he did not obtain a lien upon or right to detain the ship against the assignees of the person by whom the security had been given, the requisites of the statutes, as relating to his bill of sale, not having been complied with (*v*). But a lien may, notwithstanding the Acts, be acquired upon the certificate of registry, or other papers belonging to a ship, in like manner as upon any other deeds or papers (*w*).

The enactment of the 42d section, that a mortgagee or trustee for payment of debts shall not, by reason of the transfer to him, be deemed to be an owner, has finally put an end to the questions which had arisen under the former statutes, upon the liabilities attached to the legal interest in the ship, which, under those statutes, had been vested in the mortgagee or trustee, without any qualification. In some cases, however, the legal title may furnish the best evidence of the person to whom the credit was given (*x*).

The 43d section was intended to remedy the inconvenience of considering the mortgagor as reputed owner under the statute 21 Jac. 1, c. 19, s. 11, in cases of bankruptcy; it having been decided, that the special enactments of the Register Acts, and a compliance with them, did not defeat the operation of that statute, where the mortgagor was suffered to act and appear as owner, which in many cases he was allowed to do (*y*).

11. *What is required on a change of the Master.*

When the master, or other person, having or taking the charge or command of a registered ship shall be changed, the master or owner shall deliver to the persons authorized to make registry and grant certificates, at the port where the change shall take place,

(*u*) *Speldt v. Letchmere*, 13 Vesey, jun., 588.

(*v*) *Wilson and others v. Heather*, 5 Taunt. 642.

(*w*) *Mestaer, and another v. Atkins*, 5 Taunt. 381, and 1 Marshall, 76; *Bowen v. Fox*, 10 B. & C., 41.

(*x*) See before, Part I., c. 1, s. 11, page 22.

(*y*) *Hay and others v. Fairbairn*, 2 R. & A. 193; *Monkhouse and others v. Hay and another*, 4 B. Moore. 549; ante, p. 14.

the certificate of registry belonging to the ship,¹ who shall thereupon indorse and subscribe a memorandum of such change, and shall forthwith give notice of it to the proper officer of the port or place where the ship was last registered, who shall likewise make a memorandum of it in the book of registers, and shall forthwith give notice thereof to the commissioners of customs; but before the name of the new master shall be indorsed on the certificate, he shall give a bond, in the like penalties, and under the same conditions, as are contained in the bond required to be given at the time of the registry (z).

12. *When and how Registry de novo is to be made.*

Whenever the owner or owners, who shall have made and subscribed the declaration, shall have transferred all his or their share or shares in the ship, the same shall be registered *de novo*, before the ship shall depart from the port to which she shall then belong, or from any other port in the same part of the United Kingdom, or the same colony, plantation, island, or territory, unless a temporary certificate be obtained in the manner to be hereafter mentioned (a).

If the certificate of registry be lost or mislaid, so that it cannot be found or obtained for the use of the ship when needful, and proof thereof be made to the satisfaction of the commissioners of customs, they shall permit the ship to be registered *de novo*, and a certificate thereof to be granted; or a temporary license may be granted in such cases, and in the manner to be hereafter mentioned. But before such registry *de novo* be made, the owners and master shall give bond to the commissioners, in such sum as to them shall seem fit, with a condition, that if the certificate shall at any time afterwards be found, the same shall be forthwith delivered to the proper officers of the customs, to be cancelled, and that no illegal use has been or shall be made thereof, with their or his privity or knowledge. And if, instead of registry *de novo*, a temporary license be granted, and the ship surveyed for that purpose, the certificate of such survey shall be preserved by the collector and comptroller of the port to which the ship shall belong; and in virtue thereof, the commissioners may and are

(z) Sect. 21.—By 6 Geo. 4, c. 107, s. 125, the officers of the customs may refuse to permit any person to act as master whose name shall not be inserted in

or indorsed upon the certificate of registry as master.

(a) 3 & 4 Wm. 4, c. 55, s. 11.

required to permit the ship to be registered, after her departure, whenever the owners shall personally attend to take and subscribe the declaration required, and shall also comply with all other requisites of the Act, except so far as relates to the bond to be given by the master; which certificate of registry the commissioners shall transmit to the collector and comptroller of any other port, to be by them given to the master upon his giving such bond, and delivering up the license which had been granted for the then present use of the ship (b).

If any person shall be convicted of the offence of wilfully detaining a certificate, and it shall appear to any justice or other magistrate, that it is not lost or mislaid, but wilfully detained, he is to certify the detainer, refusal and conviction, to the persons who granted the certificate, who shall, on the terms and conditions of law being complied with, make registry of the ship *de novo*, and grant a certificate thereof, conformably to law, notifying on the back of it the ground upon which the ship was so registered *de novo*. Also, if the person detaining a certificate shall have absconded, and proof of this be made to the satisfaction of the commissioners of customs, the ship may be registered *de novo*, as in the case wherein the certificate is lost or mislaid (c).

If, after registry, a ship shall in any manner whatever be altered, so as not to correspond with all the particulars contained in her certificate, she shall be registered *de novo*, as soon as she returns to the port to which she belongs, or to any other port in the same part of the United Kingdom, or in the same colony, plantation, island, or territory; on failure whereof, the ship shall, to all intents and purposes, be considered and deemed and taken to be a ship not duly registered (d).

And if it shall become necessary to register a ship *de novo*, and any share shall have been sold since she was last registered, and the transfer of such share shall not have been recorded and indorsed in manner directed by the Act, the bill of sale thereof shall be produced to the collector and comptroller of the customs, who are to make registry of the ship, otherwise the sale shall not be noticed in the registry *de novo*; but upon the future production of the bill of sale, and of the existing certificate of registry, the transfer shall be recorded and indorsed, as well after such registry *de novo* as before (e).

(b) 3 & 4 Wm. 4, c. 55, s. 26.

(d) Sect. 28.

(c) Sect. 27.

(e) Sect. 36.

If upon any change of property in a ship, the owners shall desire to have the same registered *de novo*, although not required by the Act, and the proper number of owners shall attend at the custom house at the port to which the ship belongs, for that purpose, the collector and comptroller of the customs at that port may make registry *de novo* of the ship at the same port, and grant a certificate thereof; the several requisites in this Act mentioned and directed being first duly observed and complied with (f).

Further directions on this subject are given in the first section, the contents of which have been already mentioned.

13. *In what cases a Temporary Certificate or License may be granted.*

It has been already mentioned, that when the owners who have made and subscribed the declaration have transferred all their shares, the ship shall be registered *de novo*, before departure from port. But if the owners cannot in sufficient time comply with the requisites of the Act, so that registry may be made before it shall be necessary for the ship to depart upon another voyage, the collector and comptroller of the port where the ship may then be, are authorised to certify upon the back of the existing certificate, that the same is to remain in force for the voyage on which the ship is then about to sail (g).

If a ship be built in any of the colonies, plantations, islands, or territories, in *Asia*, *Africa*, or *America*, for owners residing in the United Kingdom, such ship may proceed by a direct or circuitous voyage to any port of the United Kingdom, there to import a cargo previous to registry, provided the master or agent for the owners shall produce to the collector and comptroller of the port at or near which the ship was built, or from which she shall be cleared for her voyage, the certificate of the builder required by the Act, and make and subscribe a declaration of the names and descriptions of her principal owners, and of her identity, and that no foreigner, to the best of his knowledge and belief, has any interest therein. And upon this, the officers are to cause the ship to be surveyed and measured, and give to the master a certificate, stating when, where, and by whom she was built, her description, tonnage, and other particulars, required on registry,

(f) 3 & 4 Wm. 4, c. 55, s. 39.

(g) Sect. 11.

and the voyage for which the ship is cleared by them; and such certificate shall, for such voyage, have the force of a certificate of registry (i). And such certificate shall also be in like force for the navigation of such ship, for any voyages whatever, during the term of two years from the date of such certificate, if such ship shall not sooner arrive at some place in the United Kingdom.

If a certificate be lost or mislaid, and proof thereof be made to the satisfaction of the commissioners of customs, and the ship be absent and far distant from the port to which she belongs, or by reason of the absence of the owners, or any other impediment, registry cannot be made in sufficient time, the commissioners may grant a license for the present use of the ship, which for the time, and to the extent specified therein, shall be of the same force as a certificate of registry. But before such license shall be granted, the master shall make and subscribe a declaration that the ship has been registered as a *British* ship, naming the port where, and the time when the registry was made, and all the particulars contained in the certificate thereof, to the best of his knowledge and belief; and shall also give a bond similar to that which is required to be given on registry *de novo* in the case of a certificate lost or mislaid; but before such license shall be granted, the ship shall be surveyed as if registry *de novo* were about to be made (j).

It has been before mentioned, that in case a certificate be unlawfully detained, the commissioners of the customs may allow the ship to be registered *de novo*; they may, however, in such cases, instead of the registry *de novo*, grant a license for the present use of the ship, in like manner as in the case of a certificate of registry lost or mislaid (k).

14. *Penalty for Detention of the Certificate.*

In case the master, or any other person who shall have received or obtained, by any means or for any purpose whatever, a certificate of registry, whether such master or other person be a part owner or not, shall wilfully detain and refuse to deliver up the same to the proper officers of the customs for the purposes of the ship, as occasion shall require, any owner or owners of the ship may make complaint on oath against the master or other person who shall so detain and refuse to deliver up the same, of such

(i) 3 & 4 Wm. 4, c. 55, s. 11.

(k) Sect. 27.

(j) Sect. 26.

detainer and refusal, to any justice of the peace, residing near to the place where such detainer and refusal shall, be in *Great Britain* or *Ireland*, or to any member of the supreme court of justice, or any justice of the peace in the islands of *Jersey*, *Guernsey*, or *Man*, or in any colony, plantation, island, or territory to his Majesty belonging in *Asia*, *Africa*, or *America*, or *Malta*, *Gibraltar*, or *Heligoland*, where such detainer and refusal shall be in any of the places last mentioned; and on such complaint the said justice or other magistrate shall and is hereby required, by warrant under his hand and seal, to cause such master or other person to be brought before him, to be examined touching such detainer and refusal; and if it shall appear to the said justice or other magistrate, on examination of the master or other person, or otherwise, that the certificate is not lost or mislaid, but is wilfully detained by the master or other person, such master or other person shall be thereof convicted, and shall forfeit and pay the sum of 100*l.*, and on failure of payment thereof, he shall be committed to the common gaol, there to remain without bail or mainprize for such time as the said justice or other magistrate shall in his discretion deem proper, not being^(m) less than three, or more than twelve months (*m*); and on the detainer being certified to the persons who granted the certificate, registry *de novo* may be made as before mentioned.

§ On the 25th section of 4 Geo. 4, c. 41, corresponding to this, it has been considered, that where the certificate of registry has been deposited, to secure advances for the use of the ship, the holder had a sufficient lien upon it to defeat an action of trover by the owner, and doubts were expressed whether a detention of the certificate on such a claim of lien was a *wilful* detention, within the meaning of that act (*n*). It has been determined also, that a conviction on this section, in which the defendant was charged with not delivering up the certificate to the officers of his Majesty's customs, without stating that they were the proper officers, or the purposes for which the certificate was required by them could not be sustained (*o*). §

15. *Evidence of Affidavits, and Books of Registry.*

The collector and comptroller of the customs at any port or

(*m*) 3 & 4 Wm. 4, c. 55, s. 27.

(*o*) *Rex v. Walsh*, 1 Adol. & El. 481.

(*n*) *Bowen v. Fox*, 10 B. & C. 41.

place, and the persons acting for them respectively, shall, upon every reasonable request by any persons whatsoever, produce and exhibit for their inspection and examination any oath or declaration, sworn or made by any owner or proprietor, and also any registry or entry in any book of registry required by this Act to be made or kept relative to any ship, and shall, upon every reasonable request by any persons whomsoever, permit them to take a copy or copies, or an extract or extracts thereof respectively; and the copy of any such oath or declaration, register, or entry, shall, upon being proved to be a true copy thereof respectively, be allowed and received as evidence upon every trial at law, without the production of the original, and without the testimony and attendance of any collector or comptroller or other person acting for them respectively, in all cases, as fully and to all intents and purposes, as such original, if produced, could or might legally be admitted or received in evidence (*p*).

Wherever the title to the ship comes strictly and properly into question, no claim can be received in opposition to the modes of conveyance required by the statutes. But there are many cases in which the possession of property, and acts of ownership exercised upon it, furnish presumptive evidence of a title to it; and some also, in which the possession alone is sufficient to maintain an action, although the legal title may be outstanding in another. And it has been held that a *British* ship does not, as to these points, differ from any other sort of property.

Thus, in an action (*q*) on a policy of insurance effected upon the ship *Chesterfield*, while absent on a foreign voyage, wherein the interest in the ship was alleged to be in *Robertson* and *Walker*, and in which it became a question, whether that allegation was sustained upon the evidence given in the cause, the learned Chief Justice of the King's Bench (Lord *Ellenborough*), in delivering the opinion of the Court on this point, expressed himself as follows: "As to the first point made in this case, on the part of the defendant, viz. that the ownership alleged was not sufficiently proved: it was proved by the captain (*Brooks*) in the ordinary way, that the owners by whom, as such, he was appointed and employed, were the persons in whom the ownership is by the

(*p*) 3 & 4 Wm. 4, c. 55, s. 40.

(*q*) *Robertson and another v. French*,
4 East, 130. And see to the same effect,

Thomas and others v. Foyle, 5 Esp. N. P.
C. 88.

declaration averred to be. And though it afterwards appeared by his answers, on cross-examination, that the ownership was derived to those persons under a bill of sale, executed by himself, as attorney to one *Lawrence Williams*, the former owner, it did not on that account become necessary for the plaintiffs to produce that bill of sale, or the ship's register, or to give any further proof of such their property; the mere fact of their possession as owners being sufficient *prima facie* evidence of ownership, without the aid of any documentary proof of title-deeds on the subject, until such further evidence shall be rendered necessary in support of the *prima facie* case of ownership, which they made, in consequence of the adduction of some contrary proof on the other side. No such contrary proof was, however, in this case, given on the part of the defendant. For the prior register in the name of *Lawrence Williams*, as owner in 1799, and a subsequent register to the same person upon a sale at the *Cape*, in 1802, under a decree of the Court of Vice-Admiralty, and which were given in evidence by the defendant, were perfectly consistent with a title in other persons in the mean time, agreeable to the averment in the declaration."

Again, in an action of trover brought for divers quantities of timber, wood, and materials, it appeared at the trial that the ship *Spring*, with the cargo, belonging to a merchant in *London*, was stranded on the coast of *Norfolk*: he went thither and saved the cargo; and afterwards sold the vessel as she lay, being then a complete hull, to the plaintiff for 600*l.*, which the plaintiff paid him. He sold her, as a ship, but the transfer was not made in the way required by the statutes. The plaintiff employed several men for some days in endeavouring to get the ship off, and superintended their exertions, and considerable hopes of success were entertained for a time; but in the end the ship went to pieces. The plaintiff, by his agents, then endeavoured to preserve the wreck; some pieces floated away and drifted on the farm of the defendant, who collected them together, broke up part in an unskilful and injurious manner, and refused to deliver them up to the plaintiff's agent, who demanded them of him. The cause was tried before Lord Chief Justice *Mansfield*; and the plaintiff was nonsuited, on the ground of want of title, from the imperfection in the mode of transferring the property from the merchant to him. The cause was afterwards brought before the Court of Common Pleas for consideration, and after argument, the Chief Justice and

the two other Judges (r) present, agreed in opinion that the plaintiff ought to have recovered. The ground of the decision was, that the plaintiff was in the actual possession, and the defendant a mere wrong doer, without any colour of title; and that although the plaintiff had failed to establish a complete title on account of the want of compliance with these statutes, yet he claimed under one who had a perfect title, and who was not now contesting the matter, and he had the possession against those who wrongfully interfered without colour of right; and his situation was compared to that of an agister, carrier, factor, and other bailees, whose title a mere wrong-doer is not allowed by law to dispute. A new trial was accordingly directed; and the plaintiff ultimately succeeded in the cause (s).

It was the practice, for a considerable time, to produce the register from the custom-house at trials at *Nisi Prius* as a proof of title, and the proof was received without question or objection. In one case indeed, Lord *Ellenborough* received the register as *prima facie* evidence of ownership, in an action brought for stores supplied to a ship; declaring, however, that he would admit contrary evidence on the part of any of the defendants, to show that they had not assented to their names being placed on the register (t). But this matter having in other causes been brought before the Courts at Westminster, it has been held that the register alone does not furnish even *prima facie* evidence to charge a person as owner of a ship, in a suit between private individuals (u). Such an use of the register was certainly not in the contemplation of the Legislature: and it is obviously possible, although not very likely to happen, that the name of a person may be placed on the register without his assent. A bill of sale duly and formally executed by an apparent vendor, but not accepted by the intended purchaser, will not transfer the property to him, and consequently is not evidence to charge him, unless it appears to have been accepted by him (v). Neither is the affidavit made by a third person, in order to obtain a register, to be received in evidence

(r) Mr. Justice Lawrence and Mr. Justice Chambre.

(s) *Sutton v. Buck*, 3 Taunt. 302.

(t) *Stokes v. Carne and others*, 2 Camp. Rep. at N. P., 339.

(u) *Frazer v. Hopkins and another*, 2 Taunt. 5; *Smith v. Fuge, the younger*,

3 Camp. 456; and *Recusse v. Myers*, Id. 475. See *Rands v. Thomas*, 5 M. & S. 244.

(v) *Tinkler v. Walpole*, 14 East, 226; *Cooper and another v. South and others*, 4 Taunt. 802.

against the parties named in it, without some proof of their adoption and assent. *A fortiori*, a part-owner, who to an action brought against himself, has pleaded in abatement, that there are other part-owners, who ought to be joined with him in the suit, cannot sustain his plea by the bare production of a register containing their names (*w*). An action was brought against three persons of the names of *Humble, S. Holland, & Williams*, to recover the price of a quantity of rope furnished by the plaintiffs at *Liverpool*, in the month of *January*, 1810, for the use of the ship *Susannah*. *Holland & Williams* had become bankrupts; and the question was, whether *Humble* was liable. The order was given in the name of the owners of the *Susannah*, by the clerk of a mercantile house at *Liverpool*, trading under the firm of *S. Holland & Co.* In order to charge the defendant *Humble* as a part-owner, the defendants produced the following documentary evidence. 1. A certificate of registry at *Liverpool*, dated the 8th of *June*, 1808, naming *S. Holland*, the defendant *Humble*, and one *Strickland*, as part-owners, which appeared to have been granted upon the affidavit of *Holland & Strickland*. 2. An indorsement on the certificate, dated the 14th of *June*, 1808, importing that *Strickland* had sold his interest to *Holland & Humble*. 3. Another indorsement, dated the 21st of *November*, 1809, recording a transfer of a moiety as made by *Humble & Holland* to the defendant *Williams*, on the 7th of *October* in that year, while the ship was at sea, and which was signed by *Holland*, as attorney for *Humble* (*x*). 4. Another indorsement on the certificate, dated the 7th of *March*, 1811, importing a transfer of the whole by the assignees of *Holland & Williams*, then bankrupts, and by *Humble* to other persons: this was signed by *Humble*. It will be observed of these documents, that the three first might have been made without the knowledge or privity of *Humble*; and therefore, according to the foregoing cases, were not evidence to charge him: and that the last was made long after the sale of the goods, and therefore could not have given any information to the sellers at the time of the sale, if they had then resorted to the custom-house in order to learn the names of the owners of the ships. On the part of the defendant it was shown, that he had at a former

(*w*) *Flower v. Young*, 3 Camp. 246. and was drawn out in this form by

(*x*) This was probably intended to mistake.
convey the whole of *Humble's* interest,

period been in partnership with *Holland* at *Liverpool*, under the firm of *Humble & Holland*, and they had sold the ship to a person of the name of *Kinneard*, who sent her to sea; but this sale was not noticed at the custom-house; that in *December* 1808, the partnership of *Humble & Holland* was dissolved, and *Holland* entered into a new partnership with *Williams*, under the firm of *Samuel Holland & Co.* The name of the new firm was painted on the counting-house, and the business of winding up the concerns of the old partnership was removed to another place. *Holland & Williams* re-purchased the ship of *Kinneard*; and on her return from the voyage on which he had sent her, they fitted her out in *January*, 1810, when the goods in question were furnished. Upon these facts, considered without regard to the operation of these Acts of Parliament, it will be obvious, that *Humble* was not interested in the ship at the time when the goods were ordered, and was not one of the persons who gave the order, or who were intended to be benefited by the supplies that the plaintiffs had furnished. So that if he were chargeable for these goods, he could be chargeable only under the evidence of the certificate and its indorsements. And the court held that he was not chargeable (y).

It may be observed, that in all these cases the evidence was offered *against* a person in order to charge him: it has also been decided, that the register is not evidence in favour of a party producing it, as the proof of title to sustain the allegation of interest in an action on a policy of insurance on a ship (z).

From these cases it appears that it may often be necessary to prove that the affidavit made to obtain registry of a ship, was actually made by the person therein named as the deponent, and consequently it may sometimes happen that the production of a copy will be insufficient for the purpose intended, notwithstanding this enactment of the statute, for the statute makes the copy evidence in those cases only where the original, if produced, would be evidence; and it has appeared that the production of the original, without proof of the signature, has been ineffectual.

16. *Power of Governors of Colonies to stay Suits.*

Any governor, lieutenant-governor, or commander-in-chief of

(y) *Mac Iver* and another v. *Humble* and others, 15 East, 169.

(z) *Pirie* and another v. *Anderson* and another, 4 Taunt. 652.

any of his Majesty's colonies, plantations, islands, or territories, may and is required, if any suit, information, libel, or other prosecution or proceeding of any nature or kind whatsoever, shall have been commenced, or shall hereafter be commenced in any court whatever in any of the said colonies, plantations, islands, or territories respectively, touching the force and effect of any register granted to any ship, upon a representation made to any such governor, &c., to cause all proceedings thereon to be stayed, if he shall see just cause so to do, until his Majesty's pleasure shall be known and certified to him by his Majesty; and such governor, &c., is hereby required to transmit to one of his Majesty's secretaries of state, to be laid before his Majesty in council, an authenticated copy of the proceedings in every such case, together with his reasons for causing the same to be stayed, and such documents (properly verified) as he may judge necessary for the information of his Majesty (a).

17. Punishment for false Declarations or Documents.

Any person who shall falsely make declaration to any of the matters required to be verified by declaration, and any person who shall counterfeit, erase, alter, or falsify any certificate or other instrument directed by the Act, or who shall make use of any such falsified certificate or other instrument, or wilfully grant any certificate or other instrument, knowing it to be false, is subjected to a penalty of 500*l.* (b).

18. Recovery and Application of Penalties.

Penalties incurred under this Act are to be recovered and disposed of as penalties incurred for offences against the laws of the customs; and officers concerned in seizures or prosecutions are to recover the like share of the produce of a seizure or penalty (c).

(a) 3 & 4 Wm. 4, c. 55, s. 44.

(b) Sect. 45.

(c) Sect. 46.

CHAPTER THE THIRD.

OF PART-OWNERS.

1. A SHIP is usually conveyed by bill of sale, or some writing of that nature, to different persons, in several and distinct shares and, consequently, the several part-owners thereby become tenants; in common with each other of their respective shares: each having a distinct, although undivided, interest, in the whole; and upon the death of any one, his share goes to his own personal representatives, and does not accrue to the others by survivorship (*a*). It is proposed to consider the nature of their interest, *first*, with relation to each other; and *secondly*, with relation to strangers.

2. First, A personal chattel, vested in several distinct proprietors, cannot possibly be enjoyed advantageously by all without a common consent and agreement among them: to regulate their enjoyment in case of disagreement is one of the hardest tasks of legislation; and it is not without wisdom, that the law of *England*, in general declines to interfere in their disputes, leaving it to themselves, either to enjoy their common property by agreement, or to suffer it to remain unenjoyed, or perish by their dissension; as the best method of forcing them to a common consent for their common benefit. But of ships, "which are built to plough the sea, and not to lie by the walls," commercial nations consider the actual employment as a matter, not merely of private advantage to their owners, but of public benefit to the state, and therefore have laid down certain positive rules in order to favour this employment, and to prevent the obstinacy of some of the part-owners from condemning the ship to rot in idleness. It sometimes hap-

(*a*) This is the most usual practice. If the interests are not severed and distinguished in this way, but the entire ship is granted to a number of persons generally, it is apprehended they become

joint-tenants at law, and that the rule *us accrescendi inter mercatores locum non habet*, which is applicable to a ship, is to be enforced only in a Court of Equity,

pens that several persons become part-owners in a ship under a fixed compact and settled agreement among them for the employment of it, or that by common consent they delegate the management of their common concern to one of them, who, by a very intelligible figure of speech is called the husband of the ship. Nothing is then left for the law of the state but to enforce the compact and agreement of the parties, according to its own mode of administering justice in analogous cases. It is only when the enjoyment of the property has not been thus settled by the parties, that it becomes necessary to inquire what mode the law of the country has prescribed for the regulation of it. Some foreign writers (*b*) on maritime law have laid it down as a rule, that if a ship is in need of repair, and one part-owner is willing to repair it, and another unwilling, he who is willing may repair it at their common expense; and if the other will not pay his quota within four months, he shall lose his share in the ship; and they found their doctrine upon a passage in the Digest (*c*), in which the same opinion is delivered with regard to the repairs of a house. But I do not find this rule adopted in practice in any country, and in case of the poverty of the party it would be extremely cruel.

The ordinances of *Oleron* and *Wisbuy* are silent on this subject of disagreement among part-owners as to the employment of a ship. By the ordinance of the *Hanse Towns* (*d*), if the owners disagree as to the freighting of the ship, the most voices shall carry it, and yet the master may take money on bottomry for those who will not contribute their part to the outfit. The *French* ordinance (*e*) directs, that in all cases which concern the common interest of the owners, the opinion of the majority in value shall be followed, and this is still the law in that country (*f*). The

(*b*) Straccha de Nav. Pars. 2, Num. 8. The author cites two others, who had written before him, and is as usual cited in his turn by Roccus and others, who have written after him. In the same passage, he very gravely tells us, that ships often want repairs, and as gravely cites the Digest to prove his proposition.

(*c*) Dig. 17, 2, 52, 10.

(*d*) Art. 59. I have followed the translation given in Malynes. The words, as given in the *Us et Coutumes de la Mer*, are, "le plus de trois emportera sur les autres," which Cleirac interprets to mean

three more on one side than on the other.

(*e*) Liv. 2, tit. 8. Des Propriétaires, Art. 5. See the Commentary of Valin; see also Pardessus Cours de Droit Commercial, Art. 621.

(*f*) En général on peut dire que le choix du capitaine et des gens de l'équipage les engagements envers eux, la rédaction des instructions suivre pendant la traversée, la location, le radoub et l'armement du navire sont des opérations que la majorité peut décider malgré la minorité.—Cours de Droit Commercial, Art. 621.

ordinance of *Rotterdam* (*g*) gives power to a majority possessed of above half the ship to let it out on freight, and to bind all the part-owners thereby, and to raise money for the outfit, either by borrowing it on bottomry, or by disbursing for the shares of the other owners, who appear unwilling to contribute after due notice. And the same ordinance (*h*) even authorizes the owners of above half the ship to sell it for the general account.

3. The law of this country appears to possess an important advantage over all the ordinances that have been cited; because, while it authorizes the majority in value to employ the ship "upon any probable design," it takes care to secure the interest of the dissentient minority from being lost in the employment of which they disapprove. And for this purpose, it has been the practice of the Court of Admiralty from very remote times to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay them the value of their shares (*i*). When this is done, the dissentient part-owners bear no portion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others (*j*). This security may be taken upon a warrant obtained by the minority to arrest the ship, and it is incumbent on the minority to have recourse to such proceedings as the best means of protecting their interest; or, if they forbear to do so, at all events they should expressly notify their dissent to the others, and if possible, to the merchants also who freight the ship. For it has been decided (*k*), that one part-owner cannot recover damages against another by an action at law upon a charge of fraudulently and deceitfully sending the ship to foreign parts, where she was lost. And it has also been decided in the Court of Chancery, that one part-owner cannot have redress in equity against another for the loss of a ship sent to sea without his assent (*l*). These decisions are consonant to

(*g*) Art. 172, 2 Magens, 108. See also on this point Weskett on Insurance, tit. Bottomry, sec. 3 & 4.

(*h*) Art. 171, 2 Magens, 108.

(*i*) Form of such a security, Appendix, No. VI.

(*j*) Anon. 2 Chan. Ca. 36, Trin. T.

32 Car. 2, and by Holt, Ch. J., in *Boson v. Sandford*, Carth. 63.

(*k*) *Graves v. Sawcer*, Sir T. Raym. 15, 1 Keb. 38, and 1 Lev. 29.

(*l*) *Strelley v. Winson*, 1 Vern. 297; Skin. 230.

the general rule of law, that where one tenant in common does not destroy the common property, but only takes it out of the possession of another, and carries it away, no action lies against him; but if he destroys the common property, he is liable to be sued by his companion. And in a case tried before Chief Justice *King*, wherein it appeared that one part-owner had forcibly taken a ship out of the possession of another, secreted it, and changed its name; and that it afterwards came into the possession of a third person, who sent it to *Antigua*, where it was sunk and lost; the Chief Justice left it to the jury to say, under all the circumstances of the case, whether it was not a destruction of the ship by the means of the defendant; and they finding it to be so, the plaintiff recovered the value of his share. The Court of Common Pleas afterwards approved of the direction of the Chief Justice (m). If a part-owner expressly notify his dissent, the Court of Chancery will not compel him to contribute to a loss (n). If the minority happen to have possession of the ship and refuse to employ it, the majority also may by a similar warrant obtain possession of it, and send it to sea, upon giving such security.

It was indeed formerly doubted in *Westminster Hall*, whether this practice of the Court of Admiralty was not an unfounded assumption of jurisdiction in a matter not within its cognizance, because arising at home and upon land; and in a case before the Court of Exchequer (o), in the reign of *Charles the Second*, Chief Baron *Hale* and the other Barons took time to consider of the point, and it does not appear that any decision was then made

(m) *Barnardiston v. Chapman and Another*, 1 Geo. 1, Sir Peter King's Cases, MS. The cause was twice tried; at the first trial, a verdict was found for the plaintiff, subject to a case, which stated only the title of the parties, and that the defendants by force took the ship out of the plaintiff's possession, and carried it away. The case was argued at the chambers of the Chief Justice, before him, and Tracy and Dormer, justices, and a new trial ordered by consent. The trial mentioned in the text was the second trial. A third trial was moved for and refused. A full note of this case is now printed in 4 East, 121.

(n) *Horn v. Gilpin*, Amb. 255. In

this case it was said, that the ground of decision mentioned in Vernon's Report of *Strelley v. Winson*, viz., that recourse should have been had to proceedings in the Admiralty, is mis-stated there, and that the real ground of decision was, that the part-owner who complained had not expressly dissented; and it appears by Skinner's Report, that there had been no express prohibition of the voyage on his part.

(o) *Justice v. Brown*, Hil. T. 19, and 20 Car. 2, Hardres, 473. This was before the flame of jealousy, that once prevailed in Westminster Hall against the Courts at Doctors Commons, had expired.

upon it. In a case, which came before the Court of King's Bench (*p*), very soon after Chief Justice *Holt* presided there, it was held, by that Court that the practice was unlawful, and the Chief Justice is reported to have said, that the majority would not be without remedy, as they might bring an action upon the case at the common law against the others for refusing their assent, and therein recover damages equivalent to the profits which might have been made on the voyage. But the remedy thus proposed, seems very difficult, on account of the uncertainty of the profits to be made by a voyage, and wholly inadequate to the ends of public policy, as it leaves the ship unemployed. And accordingly, there are several later decisions of the Courts at *Westminster Hall*, recognizing and confirming the jurisdiction of the Court of Admiralty, both as to the taking of such security, and enforcing the performance of the stipulation upon the loss of a ship. Two of these decisions took place about eight years after the case which I have last mentioned, and that case is not quoted in the report of either of them; one in the Court of King's Bench (*q*), but in the absence of Chief Justice *Holt*; the other in the Court of Common Pleas (*r*); in both of which, the authority of the Court of Admiralty was acknowledged; within a few years afterwards, however, the same point again came before the Court of King's Bench (*s*) in two other instances, at the last of which the Chief Justice is said to have been present, and the Court on both occasions directed the case to be put into a course of solemn decision, but nothing more is reported to have been done upon it. In the reign of *George* the Second, another application was made to the Court of King's Bench to stay proceedings instituted in the Court of Admiralty, to compel security to be given before

(*p*) *Knight v. Berry*, 1 Wm. & M. Carth. 26; Comb. 109; Rep. temp. *Holt*, 647; 1 Show. 13. The three first reporters say, a prohibition was granted; but from the report in *Show*, (who, however, says he did not take the case) the jurisdiction of the Court of Admiralty seems to have been admitted. This appears to be the same case as *King v. Perry*, 3 Salk. 23, in the report of which, Chief Justice *Holt* is represented to say, that the stipulation in question was unlawful.

(*q*) *Lambert v. Acretree*, 1 Ld. Raym. 223; East. T. 9 Wm. 3. On a motion for a prohibition to the Admiralty on a suit there upon the stipulation.

(*r*) *Blacket v. Ansley*, 1 Ld. Raym. 235, Trin. T. 9 Wm. 3, upon the like motion as the last case.

(*s*) *More v. Rowbotham*, 6 Mod. 162; East. T. 3 Ann., and *Degrave v. Hedges*, 2 Ld. Raym. 1285, East. T. 6 Ann., upon the same motion. The Court ordered the plaintiff to declare in prohibition in both these cases.

the departure of a ship on a voyage, of which some of the part-owners disapproved; but the Court of King's Bench refused to do so (*t*). In the last case (*u*) which I find in the books on this subject, a part-owner, possessed of a small share, instituted a suit in the Court of Admiralty against the major part-owner, who was also master, and who insisted upon making a voyage with the ship, praying that the ship might be sold, or the party have such other remedy as might be thought proper by the Admiralty; and the other applied to the Court of King's Bench to prohibit the Admiralty from proceeding in the suit; but Chief Justice *Lee* said, "I have no doubt but the Admiralty has power in this case to compel a security, and this jurisdiction has been allowed to that Court for the public good. Indeed the Admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition after sentence, or we may grant a prohibition against selling, or compelling the party to sell, or to buy the shares of others." This was agreed to by the whole Court, and the case ended by prohibiting the Court of Admiralty to direct a sale, but leaving the Court at liberty to compel security. By this determination, the law appears to have been finally settled; but the progress of it may not have been uninteresting to the learned reader.

It does not appear that any of the cases, which I have just referred to, arose upon an equal division of voices or interests in the ship; but a learned civilian (*y*), who wrote towards the end of the seventeenth century, having spoken of this power of the majority, adds, that the same thing may also be effected by the one part only, in case of equality in partnership; this doctrine is adopted by *Molloy* (*z*), and is followed in the practice of the Court of Admiralty.

The Court of Admiralty having jurisdiction to detain a vessel, at the instance of one part-owner, until the others give security to the extent of their shares, *a fortiori*, it must have such a jurisdic-

(*t*) *Dimmock v. Chandler*, 2 Stra. 890; Fitz. 197.

(*u*) *Ouston v. Hebden*, 1 Wils. 101. It does not appear by the report, that the Court of Admiralty was proceeding to direct a sale.

(*y*) *Godolphin*, in the introduction to his view of the Admiralty Jurisdiction.

(*z*) Book 2, ch. 1, s. 2. And see to the same effect *Cleirac's* note on the 59th article of the Hanseatic ordinance.

tion to detain a vessel, in a suit instituted by the real owner against a mere wrong-doer (*a*).

Though the Court of Admiralty is open all the year round to applications by part-owners, to restrain the sailing of ships without their consent, the amount of the respective shares must be apparent; for if the amount of them is a subject of dispute, the Court of Chancery will interfere, and, by injunction, restrain the sailing of the ship, till the amount of the share, for which security is to be given, shall be ascertained, which will probably be by reference to the master (*b*). But this application to the Court of Chancery must be made as expeditiously as possible; and in a case where the ship was to sail the day after the application was made, and the delay was unaccounted for, an injunction was refused (*c*).

We have seen that the Court of Admiralty cannot, *in any case*, compel any of the part-owners to sell his interest (*d*). The *French Ordinance* (*e*) prohibits one part-owner of a ship from forcing his companion to a sale (which by the *French* laws one tenant in common might in general do), except in case of equality of opinions upon the undertaking of a voyage. But a part-owner may by our law dispose of his interest to another person at any time; a rule better adapted to the present state of commerce than that (*f*) which formerly prevailed among some of the nations of the conti-

(*a*) By the Court, in the matter of *Blanchard, Baxter, and others*, 2 Barn. & Cress. 244, 1 Hagg. 311. This jurisdiction has been frequently exercised by the Court of Admiralty in causes of possession, not only against wrongdoers, but even against the Master. See the *Sisters*, (4 Rob. Adm. Rep. 276; 5 Rob. Adm. Rep. 155); the *New Draper*, (4 Rob. Adm. Rep. 287); the *John*, (1 Hagg. R. 342); the *Experiment*, (2 Dod. R. 38); the *Johan and Siegmund*, (Edwards's Rep. 242). In these cases the Court considers only the legal title; and if the question of title be doubtful it will not decree possession until a trial at law has been had to determine it. See the *Guardian*, (3 Rob. Adm. Rep. 93); the *Aurora*, (3 Rob. Adm. Rep. 133); the *Sisters*, (3 Rob. Adm. Rep. 213); the *Partridge*, (1 Hagg.

81); the *Pitt*, (1 Hagg. Rep. 240). Except in special cases, the exercise of this jurisdiction is limited to British ships (the *Renter*, (1 Dod. R. 22)). But the Court will inquire into the title in cases in which British subjects lay claim to a ship coming to the country in the possession, and as the property, of foreigners, (the *Experiment*, (2 Dod. R. 38)).

(*b*) *Haly v. Goodson and another*, 2 Meriv. 77, 2 Dod. 420.

(*c*) *Christie v. Craig*, 2 Meriv. 137.

(*d*) *Ouston v. Hebden*, 1 Wils. 101; cited in the preceding page.

(*e*) Liv. 2 Tit. 8. Des propriétaires, art. 6.

(*f*) Valin on the French Ordinance, tom. prem. 583; Loccenius de jure Marit. lib. 2, c. 5, s. 3; Consolato, c. 54.

ment, and which did not permit the sale of a ship until after a possession of three or more years; or at least not till after the performance of one voyage at the charge and risk of the part-owners (*g*). The old rule appears to have been framed with a view to the interest of the master, who in former times was a principal owner, and was the person who, with the pecuniary assistance of the other owners, generally caused the ship to be built in the expectation of being employed in the command; an expectation that might be defeated, if the others could sell their shares to strangers, who acquiring a majority of interest, might appoint a friend of their own (*h*).

In a recent case it was held, that a part-owner who had arrested the ship by process out of the Admiralty Court, and obtained security for his share, was bound to pay his proportion of the expense of the repairs and outfit incurred previous to the arrest, but not entitled to any share of the profits of the voyage (*i*).

4. With regard to the repairs of a ship and other necessities for the employment of it, one part-owner may, by ordering these things on credit, render his companions liable to be sued for the price of them, unless their liability be expressly provided against (*j*). Yet if the person who gives the credit on such an occasion, does not at the time know that there are other part-owners, he *may* sue him alone from whom he receives the order. (*k*)

It is usual for the several part-owners to appoint a person, frequently one of their own number, to be the manager of their joint concern, their general agent in the use and employment of the vessel, under the name of ship's husband. (*l*) His duties and powers as such are often defined and limited by the terms of a special agreement for that purpose between him and his employers or co-owners. Where no such agreement has been made, he is to exercise an impartial judgment in the employment of tradesmen, and the appointment of officers; and be careful that his choice in the selection of a master be not biassed by any private pecuniary transaction (*m*). § He is to see that the ship is properly repaired, equipped, and manned—to procure freights

(*g*) Molloy, book 2, ch. 1, s. 3.

(*h*) Consolato, c. 54.

(*i*) *Davis v. Johnstone*, 4 Sim. 539.

(*j*) *Wright v. Hunter*, 1 East, 20; *Bland ex parte*, 2 Rose, 93.

(*k*) *Doo v. Chippenden*, coram Kenyon, C. J., at Westminster Sittings, p. H. T. 1790, and *Baldeney and another v.*

Richie, 1 Starkie, 338, upon Pleas in Abatement; *De Mautort v. Saunders*, 1 B. & Ad. 398.

(*l*) See as to the authority of ship's husband, Mr. Justice Story's Commentaries on the Law of Agency.

(*m*) *Card and another v. Hope*, 2 Barn. & Cress. 661.

or charter parties—to preserve the ship's papers—to make the necessary entries, adjust freight and averages—disburse and receive monies, and keep and make up the accounts as between all parties interested (*l*). His acts for these purposes are considered to be the acts of all the part-owners, who are liable on all contracts entered into by him for the conduct of their common concern—the employment of the ship. Yet, where a tradesman brought an action for cordage against the owners of a ship, and it was proved that he had taken a bill of the managing owner for the amount, which was dishonoured, and renewed, and dishonoured again, Lord *Ellenborough* (*m*) said,—“ If the plaintiff, dealing with the managing owner, has adopted him, he has discharged the others. If he has adjusted accounts with him on that footing, the other defendants are entitled to the benefit of it.”

But one part-owner, though he be also managing owner, cannot, by ordering an insurance of a ship, without authority from another, charge the other with any part of the premium, unless the other afterwards assent to the insurance, because this is no part of the joint concern; a share in a ship being the distinct property of each individual part-owner, whose own affair it is, to protect it by insurance (*n*). It is otherwise if they be in partnership together, and the order be given in the name or on account of the firm (*o*). So one part-owner, although he be the husband, cannot as such, pledge the other to the expenses of a law-suit (*p*).

It is the business of a ship's husband to obtain from each of the part-owners his contribution to the charges of the outfit, repairs, and other necessities; and if he advance for one part-owner his proportion of such contribution, he may sue him separately for the amount (*q*). He has a lien also in his character of ship's husband, and agent for the owners, for expenses disbursed by him as such, or by the owners, for each individual part-owner, on the share of such part-owner, in the produce of the joint adventure. In the case of *Holderness* and *another v. Shackels* (*r*), which was trover for twenty tons of whale oil, the plaintiffs were the assignees of *Foxton*, a bankrupt, who, jointly with one *Locking*, and the defendant, was part-owner of the ship *Jane*, a vessel en-

(*l*) *Sims v. Brittain*, 4 Barn. & Adol. 376; *Law Magazine*, article, “ Mercantile Law,” No. 13.

(*m*) *Reed v. White*, 5 Esp. R. 122.

(*n*) *Ogle v. Wrangham*, coram Kenyon, C. J., Guildhall Sittings, H. T. 1790; *French v. Backhouse*, 5 Burr. 3727; and *Bell v. Humphries*, 2 Starkie, 345.

(*o*) *Hooper and another v. Lusby*, 4 Camp. 67. See also *Robinson v. Shadow*, 2 Bing. N. C. 156.

(*p*) *Campbell and another, appellants v. Stein, respondent*, 6 Dow. 135.

(*q*) *Helme v. Smith*, 7 Bing. 709.

(*r*) *Holderness v. Shackels*, 8 B. & C. 612.

gaged in the whale fishery. The usual mode of managing the cargo was, that on the arrival of the vessel at her homeward port, the blubber was deposited in a warehouse rented by the part-owners, and the oil produced from it was then put into casks, each owner's share being weighed out and placed separately in the warehouse, in casks marked with his initials. After the division, the practice was, for the warehouseman to deliver to the order of each part-owner his share of the oil, unless notice was given by the ship's husband that the part-owner's share of the disbursements had not been paid. In that case, the warehouseman used to detain the oil till the ship's husband's demand had been satisfied. After the division, and after a portion of *Foxton's* share of the oil had been delivered to him, he became bankrupt, and the warehouseman had orders from the ship's husband not to deliver to A. the remaining oil, as his share of the disbursements of the ship had not been paid. Mr. Justice *Bayley* said,—“Where there is a joint adventure which produces certain goods, the proper course is, first to deduct all the expenses which have been incurred in order to obtain those goods, and then to divide the residue among the shareholders, in proportion to the shares to which each is entitled respectively. In this case, the joint adventurers obtained a quantity of oil in bulk. No partner, or representative of a partner, had a right to his aliquot part of that oil, until he had paid his share of the expense of procuring it. That will be the case whether the shareholder has become bankrupt or continues solvent. If he continues solvent, he may pay his share of the outfit and of the expense. If he does not pay it in money, the other part-owners have a right to see that an aliquot part of what has been gained in the adventure be retained, so as to pay that share of the outfit which he ought to pay. In this case, *Foxton* became bankrupt; and having become bankrupt, if he could have paid in money his share of the outfit, there would have been twenty-nine tons of oil coming to him. He could not pay, and therefore, as it seems to me, the justice and law of the case is, that his share of the expense should be paid out of the twenty-nine tons, and that until he has paid his share of the expense, he cannot claim that quantity.”

5. The interest of part-owners in the profit and loss of an adventure undertaken by their mutual consent, is not affected by the bankruptcy of one of them taking place after the commencement of the voyage, although he has not paid his full share of the

outfit. In such a case, if the other part-owners have in that character paid the expense of the outfit, or made themselves responsible for it, they will have a right to *deduct* his share thereof from the portion of the profits of the voyage to be paid to his assignees *(s)*.

In one case indeed, where the outfit had been conducted by a person appointed to manage the concern as purser or ship's husband, in pursuance of an agreement made by three others at the time of their becoming owners of the ship, and this person settled the accounts with them, and took from one of them, who afterwards became a bankrupt, promissory notes payable at a future day, for a part of his share of the expense; it was determined, that the assignees of the bankrupt were entitled to receive his full share of the profits, and that the ship's husband must take a dividend under the commission for the amount of the notes. In this case the husband had after his appointment acquired an interest in the ship, by purchasing a part of the share of one of the other part-owners; but his right as a part-owner does not appear to have been insisted upon; and indeed he had made the disbursements, and managed the concern, not in the character of a part-owner, but of an agent. After the bankruptcy had happened, the other two part-owners paid two-thirds of the amount of the bankrupt's notes to the ship's husband, and agreed with him to consider the bankrupt as interested only in the proportion which the money he had paid bore to the whole cost and outfit. But this transaction was held not to affect the question, nor alter the right or interest of the bankrupt, or of the assignees, upon whom they had devolved *(t)*.

In this case, which was sent from the Court of Chancery for determination at law, the question was made and decided with respect as well to the value of the bankrupt's share in the ship itself, as to the profits of the adventure, without distinction.

In the report of another case, before Lord Chancellor *Hardwicke* *(u)*, it is stated, that several persons having entered into a

(s) *Holderness v. Shackels*, 8 B. & C. 612.

(t) *Smith and others v. De Silva and others*, Cowp. 469. But see *Holderness v. Shackels*, 8 B. & C. 612.

(u) *Doddington v. Hallett*, 1 Ves. 497. Upon reference to the Register Book of the Court, anno 1749, folio 625,

it appears that the plaintiffs had covenanted with T. Hall, the intestate, to take certain shares subscribed for by them, and which amounted together to eleven sixteenths, of a ship to be built and fitted out under his directions for the service of the East India Company; that the ship

contract with one *T. Hall*, empowering him to build and fit out a ship at their joint expense, for the service of the *East India Company*, and he having died insolvent, without paying his portion of the expense, the others, who of course remained answerable to the tradesmen for the whole, filed a bill against his administrator, praying that they might have a specific lien upon what should be due to him for his share to this extent; and that the administrator might not apply this as part of his general assets for the benefit of all the creditors; and that his Lordship determined that they had a specific lien on his share for what they had paid or were liable to pay to the tradesmen for building and equipping the ship. The building and equipment had been managed by the deceased. In the course of his judgment, the Lord Chancellor, adverting to one part of the argument urged on the part of the administrator, is reported to have said, "the defendant's counsel have been forced to resort to the case of an assignment of a share for a valuable consideration: which not being the case, I will not now determine, because that is to be governed by the course of trade. If it stood on the head of general equity, I should be of opinion, that if such a purchaser had notice of the partnership, he would be subject to it, and should not doubt granting an injunction to that action of trover: if he had not notice is another thing, and a strong case for that purchaser; because he would have gained the legal interest: but if by the course of trade it is otherwise, that will prevail and govern in this case, and the Court will never extend a partnership of this kind to affect purchasers beyond what the course of trade will do, which is to govern in mercantile matters."

was accordingly built and equipped, and was then at sea, and the builder had executed a general bill of sale of the whole to him, and he had not executed any bill of sale to them for their respective shares. The defendant by his answer admitted, that he was a trustee for the plaintiffs as to the eleven sixteenths, but submitted that they were not liable to the tradesmen, because the debts were contracted by the intestate, and further insisted that they had no specific lien on the shares, which, not being subscribed for, belonged to him. The Lord Chancellor decreed a

reference to the Master to take the accounts, and directed allowance to be made to the plaintiffs for all such sums as they had paid or were liable to pay to the tradesmen or workmen for building, equipping, or victualling the ship, or for seamen's wages, and declared that if any balance should appear due to them, they had a specific lien on the remaining shares for such balance, and those shares were to be sold before the Master, and the money applied in the first place to the discharge of such balance.

This usage, or course of trade, I apprehend to be to charge the assignee or purchaser in account for the outfit and other expenses incurred, in respect of the voyage, of which he is entitled, in consequence of his purchase, to share the profits, which can be only the voyage in prosecution at the time of the purchase, but not to carry back the charge as against him to the expense of any antecedent adventure, from which he can derive no profit.

It will be observed that one of these cases arose out of a bankruptcy, and the other out of an insolvent intestacy. In each of them, therefore, the Lord Chancellor would have a general jurisdiction over the effects, and the principles of equitable jurisdiction might be applied. It seems to have been considered, that part-owners might have a lien on each other's shares of a ship, as partners in trade have on each other's shares of their merchandize; but I do not find this point to have been ever decided; and there is a material difference between the two cases. Partners are at law joint-tenants of their merchandize; one may dispose of the whole property; but part-owners are tenants in common of a ship. One cannot sell the share of another. And if this general lien exist, it must prevail against a purchaser, even without notice; which does not seem consistent with the nature of the interest of a tenant in common. It is true indeed, that as long as the ship continues to be employed by the same persons, no one of them can be entitled to partake of the profits until all that is due in respect to the part he holds in the ship has been discharged. But as one part-owner cannot compel another to sell the ship, there does not appear to be any mode by which he can enforce against the other's share of the ship in specie, the payment of his part of the expenses.

§ In a more recent case, *ex parte Young (v)*, the petitioners were part-owners of a ship called the *Grenville Bay*, with other persons, two of whom, *William Lushington* senior and junior, became bankrupts on the 6th of January, 1812. The bankrupts were also the managing owners, and in that character were indebted to the petitioners and the other owners 287*l.* on balance of accounts, for the freight and earnings of the ship, after taking credit for the outfit, amounting to 2234*l.*, which sum the bankrupts had not paid; and after the bankruptcy, the other owners were obliged to

pay it. The assignees sold the share of the bankrupts for 780*l*. The petition prayed an application of the proceeds of the share of the bankrupts in the ship, freight, &c., towards satisfaction of the sums so due to the petitioners and the other owners. Lord Chancellor *Eldon* observed,—“The difficulty in this case arises upon the decision of *Doddington v. Hallett*, by Lord *Hardwicke*, which is directly in point. That case is questioned by Mr. *Abbott*, who doubts what would be done with it at this day, and I adopt the doubt. The case, which is given by Mr. *Abbott* from the Register's book, is a clear decision by Lord *Hardwicke*, that part-owners of a ship being tenants in common, and not joint-tenants, have a right, notwithstanding, to consider that as a chattel, used in partnership, and liable as partnership effects, to pay all debts whatever to which any of them are liable on account of the ship. His opinion went the length that the tenant in common had a right to a sale. There is great difficulty upon that case; and the inclination of my judgment is against it; but it would be a very strong act for me, by an order in bankruptcy, from which there is no appeal, to reverse a decree made by Lord *Hardwicke* in a cause. From a manuscript note, I know it was his most solemn and deliberate opinion, after great consideration, that the contrary could not be maintained; and there is no decision in equity contradicting that.” Upon a subsequent day, Lord *Eldon* said, that after much consideration, he must decide against the case of *Doddington v. Hallett*. And soon afterwards a petition, presented under similar circumstances in another bankruptcy, was also dismissed (*w*).§

It is said to have been decided in the Court of Chancery, in a case where the majority of the part-owners had settled an account of the profits of a voyage, that the others were concluded thereby; and the Court would not entertain a suit by one of them to unravel the accounts (*x*). I presume this to have been a settlement with the master.

6. The ordinary remedy for part-owners to obtain an adjustment of the ship's accounts among themselves is a suit in a Court of Equity. The only proceeding at the common law, generally

(*w*) *Harrison ex parte*, 2 *Rose*, 76.

(*x*) *Robinson v. Thompson*, 1 *Vern.* 465. The Hanseatic Ordinance of 1614 requires the master at his return home to summon all the part-owners to receive and

pass his accounts, and imposes a fine upon those who do not attend the first time in person or by agent; and at the second time authorises the others to make a final settlement without them.

applicable to their case, is an action of account, and this proceeding has long fallen into disuse. But in a case where several part-owners entered into a written agreement, whereby they and each and every of them did agree to and with the others and each and every of the others, that the ship should proceed on a certain voyage, and be under the exclusive management and control of one of the parties as husband thereof; and that, after the ship's return, a full account should be made out of the ship and her concerns, and the neat profits be divided according to the proportions; it was held that each individual party to the agreement might maintain an action at law upon it against him, who had acted as the husband, for not making out an account and dividing the profits within a reasonable time after the ship's return (y). § Thus where two part-owners of a ship, who were also partners as to the proceeds of a voyage, settled and adjusted their accounts as to that voyage; and one of them, in consideration of a larger share of profits than he was otherwise entitled to, agreed to pay the broker's bill; it was held, that the broker's bill became his own individual debt, which might be recovered from him by the other partners, by whom it had been paid to the broker (z). So also, where the master of a vessel covenanted with the several part-owners to pay certain monies to them, and *their several executors, &c.*, at a certain bankers, and in such parts and proportions as were set against their several and respective names, it was decided that each covenantee might sue severally in respect of his several interest, and that they could not maintain a joint action (a). §

7. Secondly. As to the interest of part-owners with regard to strangers.

The several part-owners of a ship make in law but one owner; and in case of any injury done to their ship by the wrong or negligence of a stranger, they ought regularly to join in one action at law for the recovery of damages, which are afterwards to be divided among themselves according to their respective interests; for otherwise, the party who had committed the wrong, might be unnecessarily harassed with the expense of several suits to obtain the same end, which might be as well effected in one.

(y) *Owston v. Ogle*, 13 East, 538.

(z) *Wilson v. Cutting*, 10 Bing. 436.

(a) *Servante v. James*, 10 B. & C.

410. See also *Radenhurst v. Bates*, 3 Bing. 463; *Helme v. Smith*, *supra*.

But this rule of law is made for the ease of the wrong-doer ; and, therefore, the law requires that he should avail himself of it at the very beginning of the cause, by pleading in abatement of a suit brought by one part-owner, that there are others living, who ought to be parties to it. For if the defendant does not do this, the single part-owner will recover damages for the injury proportionate to his share in the ship, whether the nature of his interest is made to appear upon evidence at the trial, or is originally stated by himself in the allegation of his cause of complaint (b). And if afterwards another part-owner sues for his own interest, the defendant can no longer avail himself of the objection, because the party to the first suit has no longer any matter of complaint (c). In the case of the death of any part-owner after an injury received, the right of action survives in general to the surviving part-owners, who must afterwards pay to the personal representatives of the deceased the value of his share.

In the case, however, of an action for the freight of goods conveyed in a *general* ship, all the part-owners ought to join, or if they do not, the defendant may avail himself of the objection by evidence at the trial, and without plea in abatement, according to the general rule of law, and the distinction between contracts and wrongs (d), unless, perhaps, some one should have received his own share, or have released his claim to it. The necessity of all the part-owners joining as plaintiffs in the suit in this case, is founded upon the consideration, that all of them are partners with respect to the concerns of the ship ; and, upon this consideration, Lord Chancellor *Eldon*, in a case of bankruptcy, wherein it appeared that the owners of a ship, upon a settlement of accounts with the master, who had become a bankrupt, were indebted to him, and, that, on the other hand, he also was indebted to some of them severally upon separate and distinct concerns, refused to allow the latter to set off their respective demands

(b) *Sands v. Childs and Others*, Salk. 32 ; *Addison v. Overend*, 6 Ter. Rep. K. B. 766, and see *Dockwray v. Dickenson*, Comb. 366

(c) *Sedgworth v. Overend*, 7 Ter. Rep. in K. B. 279. In this case, the plaintiff was the only remaining part-owner ; but the opinion delivered by Mr. Justice

Lawrence is an authority for the text.

(d) There is a loose note in 3 *Keeble*, 444, *Stanley v. Ayles*, of a dictum of Chief Justice Hale at *Nisi Prius*, to the contrary of what is here advanced in the text ; but the reporter adds, that the cause went off to a reference.

against the claim of his assignees for their shares of the general debt (e). § And although the share of each part-owner be his separate property, yet, where *A.*, *B.*, and *C.* were owners of a vessel, and *B.* and *C.* employed *D.* to sell it for them, which he did, and paid over their proportion of the purchase-money to *B.* and *C.*, but refused to pay *A.* his proportion of the proceeds of the sale of the vessel, and *A.* alone sued him for the amount, it was held he could not recover. For here was a joint contract, and persons having separate interests in a ship may jointly agree to authorize another to sell the entirety for them (f). But if several part-owners allow one of their number to deal with their joint property as his own, and he lend the proceeds of it, and receive credit for them in account in his own name, although the property was joint, his contract with the borrower may have been separate, and they must shew that it was not so, if they would sue upon it (g). §

On the other hand, if an action is to be brought against the part-owners upon any contract relating to the ship, although regularly such action should be brought against all jointly, yet if all are not sued, the defendants can only avail themselves of the objection by plea in abatement; and if they omit to plead such a plea, the plaintiff will recover his whole demand, and the defendants must afterwards call upon the others for contribution. Where the declaration assuming the form of an action *ex delicto*, alleges a breach of duty and not a breach of promise, it has been much questioned, whether one part-owner who is sued alone, can avail himself of this plea, and also, whether if the action be brought against more persons than appear at the trial to be part-owners, the plaintiff can sustain his suit against those who appear to be so, or must fail altogether. In a case of a similar nature, the Court of King's Bench decided some time ago that the plea was not admissible (h), but in another case, the Court of Common Pleas afterwards held it to be admissible (i), and following up its own judgment, decided in a third case, that the plaintiff who had failed in proving all the defendants to be part-owners must fail alto-

(e) *Ex parte Christie*, 10 Ves. jun., 105.

(f) *Hatsell v. Griffith*, 2 C. & M. 679.

(g) *Sims v. Bond*, 5 B. & Ad. 389; *Ex parte Gribble, Deacon & Chitty*, 339.

(h) *Govett v. Radnidge*, 3 East, 52.

(i) *Powell v. Layton*, 2 New Rep. 365.

gether (*k*). A writ of error was brought on this latter judgment, which was argued before the twelve Judges, and it was understood that much difference of opinion existed among them, but the cause was decided on a different ground (*l*). In a fourth case of a similar nature, wherein the declaration expressly alleged a bargain, and complained of a deceitful warranty in the nature of a wrong; the action being against two persons, and the plaintiff proving a sale by one alone, the Court of King's Bench held that he could not succeed against that one, but must wholly fail (*m*). These are mere points of form, and it will be sufficient to have noticed them thus shortly, in order to put the professional reader upon his guard.

8. If a tradesman, who has repaired a ship, take from some of the part-owners sums equivalent to their shares, they still remain responsible for the residue, if not paid by the others, unless at the time of the payment the tradesman specially agree to discharge them from all further demand, upon some good consideration inducing him so to do, such as payment before the expiration of the usual credit, or release them by deed (*n*), which no prudent man will do without some very strong inducement. In this respect, the law of *England* differs from the Civil Law, which gives an action against any one part-owner upon a contract made by the master to the full extent of the demand, but in the case of contracts made by the part-owners themselves, holds each to be chargeable only in proportion to his own share of the ship (*o*). By the law of *Holland*, the several part-owners are, in all cases, chargeable only according to their respective interests in the ship (*p*).

(*k*) *Max v. Roberts*, 2 New Rep. 450.

(*l*) *Max v. Roberts*, in Error, 12 East, 89.

(*m*) *Weal v. King*, 12 East, 452.

(*n*) *Teed and Another v. Baring and Others*, before Lord Ellenborough, Ch. J., at Guildhall, 1806. The receipt given by one of the plaintiffs was as follows: "Received 30th May, 1804, from Messrs. B. M. & Co., one-fourth owner of the ship William, Captain James Thomson, the sum

of 450*l.*, being the amount of their proportion of the said ship's repairs lately done at Plymouth, we having settled with the other owners respectively, John Teed & Co." Messrs. Baring & Co. knew that the proportions had been adjusted, but not paid. See *Fitch v. Sutton*, 5 East, 230; *Wright v. Hunter*, 1 East, 20.

(*o*) Dig. 14, 1. 1. 25 and 14, 1, 2, 3, and 4.

(*p*) *Vinnius in Peckium*, p. 155.

PART II.

OF THE PERSONS EMPLOYED IN THE NAVIGATION OF MERCHANT SHIPS.

CHAPTER THE FIRST.

OF THE QUALIFICATIONS OF THE MASTER AND MARINERS.

1. THE master of a ship is the person entrusted with the care and management of it. His power and authority are so great, and the trust reposed in him is of so important a nature, that the greatest care and circumspection ought to be used by the owners in the choice and appointment of him. It appears by the language of the ancient sea-laws and ordinances, that the master was formerly in almost every instance a part-owner of the ship, and consequently interested in a two-fold character in the faithful discharge of his duty. At present, it frequently happens that he has no property in the ship. The law of some countries requires a previous examination of the person to be appointed to this important office, in order to ascertain his nautical experience and skill: in other countries, he is liable to be punished as a criminal, if, having undertaken the charge, he is found incompetent to the performance of it (a). In this country the owners are left to their

(a) By the French Ordinance, liv. 2, tit. 1, Art. 1, *Aucun ne pourra ç'après être reçu capitaine maître ou patron de navire, qu'il n'ait navigé pendant cinq ans, et n'ait été examiné publiquement sur le fait de la navigation, et trouvé capable par deux anciens maîtres en présence des officiers de l'amirauté, et du professeur d'hydrographie, s'il y'en a dans*

le lieu;" upon which Valin remarks, " L'inconvénient est néanmoins que des sujets très capables et à qui il ne manque que la formalité de la reception perdent quelquefois l'avantage de commander des navires à l'occasion, par la misérable avarice ou par le caprice, de certains officiers de d'Amirauté qui ne sont pas d'humeur d'accorder ces sortes de démis-

own discretion, as to the skill and honesty of the master; and although he is bound to make good any damage that may happen to the ship or cargo, by his negligence or unskilfulness, if he is of ability to do so, yet he cannot be punished as a criminal for mere incompetence.

At the publication of the earlier editions of this book, there existed one excepted case, arising out of one of the humane provisions made by the *British* Legislature for the regulation of the *African* Slave Trade (*b*); but this trade being now wholly prohibited to her Majesty's subjects, the exception need be no longer noticed.

The other persons employed in the ordinary navigation of a trading ship, fall under the general denomination of mariners and seamen.

For the employment of a *British* ship it is necessary that the master, and a certain proportion of the mariners, should in many cases be *British* subjects, from a very obvious principle of public policy, enforced by various provisions of the Legislature. So long ago as the reign of Queen *Elizabeth*, it was made unlawful to lade or carry any fish, victual, or other things in any bottom, whereof a stranger born was ship-master, from one part of the realm to another (*c*). An ordinance made in the time of the usurpation required, in some particular cases, the master and mariners, or the most part of them, to be of the people of the commonwealth (*d*). The celebrated Navigation Act, which passed immediately after the Restoration, required the master, and three-fourths of the mariners, to be subjects of the King, wherever it required a *trading* ship to be either *English* built or *English* owned (*e*). And by a statute passed in the following year, "the

soires." Cleirac, in his "*Jugemens d'Oleron*," ch. i, says, that the title of the master of a ship implies, honour, experience, and morals, "*reverendum honorem sumit quisquis majistri nomen acceperit*." The Ordinances of the Hanse Towns, of Bilbao, of Prussia, and Sweden, have all required the master to be previously examined and certified, to be fit by experience, competence, and character. The establishment of similar regulations in this country, would seem to be an object of urgent necessity, for the preservation

of life and property.—See Macculloch, *Dict. of Commerce*, Supplement Ships.

(*b*) 39 Geo. 3, c. 80, s. 23.

(*c*) 5 Eliz. c. 5, s. 8, under forfeiture of the goods. To which the ordinance of the 9th of October, 1651, and the Navigation Act, add also the forfeiture of the vessel.

(*d*) Ordinance of 9th October, 1651, Scobell's Acts.

(*e*) 12 Car. 2, c. 18. See Reeves's *Law of Shipping and Navigation*, pp. 304, 305.

number of mariners was to be accounted according to what they should have been during the whole voyage" (*f*). These regulations, however, having been found inconvenient in time of war, several temporary statutes (*g*) allowed, during such periods, the employment of three-fourths foreign seamen: and the two first of those statutes conferred the privileges of *British* subjects upon foreign seamen after *two years'* service in the time of war, either on board a ship of war, or a merchant or trading vessel.

This subject was further regulated by a statute passed in the thirty-fourth year of the reign of Geo. 3, as to *Great Britain* (*h*); and by another statute passed in the forty-second of the same reign as to *Ireland* (*i*). But that statute, and all others relating to the subject, having been repealed in the sixth year of the reign of King George the Fourth, it was, by a statute of that year, and subsequently by the 3 and 4 Wm. 4, c. 54, (the Navigation Act now in force) enacted, that no ship shall be admitted to be a *British* ship, unless duly registered and navigated as such; and that every *British* registered ship (so long as the registry of such ship shall be in force, or the certificate of such registry retained for the use of such ship), shall be navigated during the whole of every voyage (whether with a cargo or in ballast), in every part of the world, by a master who is a *British* subject, and by a crew whereof three-fourths at least are *British* seamen; and if such ship be employed in a coasting voyage from one part of the United Kingdom to another, or in a voyage between the United Kingdom and the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*; or from one of the said islands to another of them, or be employed in fishing on the coasts of the United Kingdom, or any of the said islands, then the whole of the crew shall be *British* seamen (*j*). And it is further enacted, that no person shall be qualified to be master of a *British* ship, or to be a *British* seaman, within the meaning of the act, except natural born subjects of his Majesty, or persons naturalized by Act of Parliament, or made denizens, or who have become *British* subjects by virtue of conquest, or cession of some newly acquired country, and who shall have taken the oath of allegiance, or the oath of fidelity required by the treaty

(*f*) 13 & 14 Car. 2, c. 11, s. 6.

(*g*) 6 Anne, c. 37; 13 Geo. 2, c. 3;
28 Geo. 2, 16; 19 Geo. 3, c. 14; 33
Geo. 3, c. 26; 43 Geo. 3, c. 64.

(*h*) 34 Geo. 3, c. 68.

(*i*) 42 Geo. 3, c. 61.

(*j*) 3 & 4 Wm. 4, c. 54, s. 12.

or capitulation: or persons who shall have served on board some of his Majesty's ships of war, in time of war, for the space of three years. The natives, however, of places within the limits of the *East India* Company's charter, although under *British* dominion, are not, upon the ground of being such natives, to be deemed *British* seamen. It is provided, however, that a ship not required to be wholly navigated by *British* seamen, which shall be navigated by one *British* seaman for every twenty tons of her burthen, shall be deemed to be duly navigated, although the number of other seamen shall exceed one-fourth of the whole crew (*l*). But it is provided, and further enacted, that his Majesty may, by his royal proclamation during war, declare, that foreigners, having served two years on board any of his ships of war, in the time of such war, shall be *British* seamen, within the meaning of the act (*m*). And it is further enacted, that no *British* registered ship shall be suffered to depart any port in the United Kingdom, or any *British* possession in any part of the world (whether with a cargo or in ballast), unless duly navigated; with a proviso, that *British* ships trading between places in *America* may be navigated by *British* negroes, and ships trading eastward of the *Cape of Good Hope*, within the limits of the *East India* Company's charter by *Lascars*, or other natives of countries within those limits (*n*). It is further enacted, that if any *British* registered ship shall at any time have, as part of the crew, in any part of the world, any foreign seamen not allowed by law, the master or owners thereof shall, for every such seaman, forfeit 10*l*.; but if a due proportion of *British* seamen cannot be procured in any foreign port, or any place within the limits of the *East India* Company's charter, for the navigation of any *British* ship; or if such proportion be destroyed during the voyage by any unavoidable circumstance, and the master shall produce a certificate of such facts, under the hand of any *British* consul, or of two *British* merchants, if there be no consul at the place, where such facts can be ascertained, or from the *British* governor of any place within the limits of the *East India* Company's charter; or, in the want of such certificate, shall make proof of the truth of such facts, to the satisfaction of the collector and comptroller of

(*l*) 3 & 4 Wm. 4, c. 54, s. 16.

(*m*) Sect. 17.

(*n*) Sect. 18. See also as to the

employment of *Lascars*, and the navigation of ships in India, 4 Geo. 4, c. 80, s. 20 to 28.

the customs of any *British* port, or of any person authorized in any other part of the world, to inquire into the navigation of such ship, the same shall be deemed to be duly navigated (o).

And it is further enacted, that if his Majesty shall *at any time*, by his royal proclamation, declare that the proportion of *British* seamen necessary to the due navigation of *British* ships, shall be less than the proportion required by this act, every *British* ship navigated with the proportion of *British* seamen, required by such proclamation, shall be deemed to be duly navigated, so long as such proclamation shall remain in force (p).

§ On this section (6 Geo. 4, c. 109, s. 19), it has been held, that a ship which lost her proportion of *British* by death at *Sierra Leone*, and could not on any reasonable terms re-place them, except with foreigners, was within the exemption; and the vessel having been lost on her voyage home, with an over proportion of foreign hands, that although no certificate had been obtained the insurers were not precluded from recovering against the underwriters, the circumstances of excuse being satisfactorily proved to a jury at the trial (q). §

(o) 3 & 4 Wm. 4, c. 54, s. 19.
(p) Sect. 20.

(q) *Suart v. Powell*, 1 B. & Ad. 266.

CHAPTER II.

OF THE AUTHORITY OF THE MASTER WITH REGARD TO THE
EMPLOYMENT OF THE SHIP.

1. A trading ship is employed by virtue of two distinct species of contract: First, The contract by which an entire ship, or at least the principal part thereof, is let for a determined voyage to one or more places. This is usually done by a written instrument, signed and sealed, and called a charter-party. Secondly, The contract by which the master or owners of a ship destined on a particular voyage, engage separately with a number of persons unconnected with each other, to convey their respective goods to the place of the ship's destination. A ship employed in this manner is usually called a *general* ship.

The nature of each of these contracts will form the subject of particular discussion hereafter (*a*). In the present chapter it is proposed to consider only the power of the master to bind the owner of the ship by these engagements.

2. The owners rarely navigate a trading ship by themselves; the conduct and management of it are almost always entrusted to the master, whether he has or has not a partial property in it. In the latter case he is the confidential servant or agent of the owners at large; in the former, of his co-partners. In either case by the law of *England*, and in conformity to the rules and maxims of that law in analogous cases, the owners are bound to the performance of every lawful contract made by him relative to the usual employment of the ship. They are bound to this performance by reason of their employment of the ship, and of the profit derived by them from that employment (*b*). One part-owner, who dissents from a particular voyage in the manner mentioned in a preceding

(*a*) Part 3, ch. 1 & 2.

(*b*) See Molloy, book 2, chap. 2, sect. 14.

chapter (c) is not bound, because he does not employ the ship on that voyage, nor derive any profit from it (d). The course of the usual employment of the ship is evidence of authority given by the owners to the master, to make for them and on their behalf a contract relating to such employment; and consequently a contract so made by him is esteemed in law to have been made by them. It (e) is true that the master also is answerable for his own contract; for in favour of commerce the law will not *compel* the merchant to seek after the owners and sue them, although it gives him the power to do so; but leaves him a two-fold remedy against the one or the other. But in pursuing this remedy, care must be taken to describe the defendant according to his real character. For in an action at law (f), brought against a person as master, at the trial whereof it appeared upon the proof that the defendant was not master, but owner, the plaintiff failed in his suit.

This rule of the law of *England* agrees with the law of other commercial nations. When the *Romans* began to engage in commerce (g), a new species of action under a particular name appears to have been introduced, to ascertain and enforce this responsibility of the owners for the acts of their servants; and by the *Prætorian Edict* the owners, or (to render the Latin word more nearly) the *employers*, of the ship are made responsible for the

(c) Part 1, ch. 3, sect. 4, p. 70.

(d) By Holt, Ch. J., in *Boson v. Sandford*, Carth. 63.

(e) *Morse v. Slue or Sluce*, 1 Vent. 190, 238.

(f) *Richwood v. Footmer*, coram Kenyon, Ch. J. Sit. p. Hil. T. 1790.

(g) Dig. 4. 9. *Nautæ, caupones stabularii, ut recepta restituant*.

Dig. 14. 1. *De Exercitoria actione*, Molloy in his *Treatise De Jur. Marit, et naval.* book 2, ch. 2, sect. 2, appears to have mistaken the character of the *Exercitor navis* of the civil law, and to have supposed him to be the master of the ship; whereas in truth he is the employer of the ship, and consequently must be the absolute, or at least the temporary owner. "Magistrum navis accipere debemus, cui totius navis cura mandata est. Magistrum autem accipimus non solum, quem exercitor præposuit, sed et eum, quem magister. Exercitorem autem eum dicimus,

ad quem obventiones et reditus omnes perveniunt, sive is Dominus sit, sive a domino navem per aversionem conduxit, vel ad tempus, vel in perpetuum." Dig. 14, 1, 1. And Roccus, Not. 3, speaks to the same effect of the *Magister*. This author usually calls the owner *dominus navis*, but he often speaks of him as the person qui exercet navem. Again, in the Dig. 4, 9, 1, 2, we find the following commentary on the *Prætorian Edict*. The terms of the edict are, "Nautæ, caupones stabularii, quod cujusque salvum fore repperint, nisi restituant, in eos judicium dabo." Upon which Ulpian writes thus. "Ait Prætor Nautæ; Nautam accipere debemus, eum qui navem exercet, quamvis nautæ appellantur omnes, qui navis navigandæ causa in nave sint, sed de exercitore solummodo Prætor sentit, nec enim debet per remigem, aut mesonautam obligari, sed per se, vel per navis magistrum."

faults of the mariners and master, and for the contracts also of the master; but not for the contracts of the mariners, because the mariners are not appointed for the purpose of conducting the business of the ship, but only of labouring in its navigation under the orders of the master. And with regard to the contracts of the master, a distinction is taken by the commentators on the Edict between such as the owners have authorised him to make, and such as they have not authorised him to make; but in general it appears that they were answerable for all acts, of which his character and situation afforded the presumption of authority, even if he contravened the orders received from them; unless the party with whom he contracted were acquainted with the orders by which his authority was restrained. Thus it is expressly laid down, that if the master appointed another person to supply his place, contrary to the positive orders of the owners, the owners were responsible for the conduct of the master so appointed even against their will. On the other hand, if a ship were built for the purpose of conveying passengers only, or merchandize only, and employed in that particular trade, the owners were not answerable for a contract made by the master to employ the ship for a different purpose in a different trade. This agrees with the terms of the rule as above laid down, because such a contract does not relate to the usual employment of the ship.

The modern nations of *Europe* appear to have adopted nearly the same rules, founded on the same principle (*h*), with certain limitations, that will be noticed hereafter. Indeed it often happens that no contract can be made with the owners personally; as when the ship is in a place distant from their residence, even when the ship is at the place of their residence, and is intended to be employed as a *general* ship, it rarely happens in practice that the owners interfere with the receipt of the cargo; and without doubt they are by our law bound by every contract made by the master relative to the usual employment of *such* a ship.

A charter-party, made by the master in his own name furnishes no direct action against the owners, grounded upon the instrument

(*h*) Roccus. Not. 11 to 18 inclusive, and Not. 26, 27, 28. Not. 49, *ad finem*. and Not. 65. Guidon, ch. 18, art. 4; and Cleirac's Comment. thereon. French Ordinance, liv. 2, tit. 8. Des Propri-

taires de navires, art. 2, and the Commentary of Valin thereon. Pothier, Charte-partie, sec. 2, art. 3; Welwood's Sea Laws, tit. 15. See as to the Limitations, part. 3, ch. 5 of this Treatise.

itself, by the law of *England*; but when this contract is made by the master in a foreign port in the usual course of the ship's employment, and under circumstances which do not afford evidence of fraud, or when it is made by him at the ship's home under circumstances which afford evidence of the assent of the owners, the ship and freight, and therefore indirectly the owners also, to the amount of the value of the ship and freight, are by the marine law bound to the performance (i). "*The ship is bound to the merchandise, and the merchandise to the ship,*" are the words of *Cleirac* (j). By the *French* ordinance (k) it is declared, that the ship, with its furniture and freight, and the cargo, are respectively bound to the stipulations of the charter-party. And *Valin*, in his Commentary, says the rule is the same whether the affreightment be made by the owner, or the master alone, even at the place of the owner's abode, if the owner does not disavow it.

By the *French* ordinance (l) the master is bound to follow the advice of the owners, when he freights the ship at the place of their abode. The ordinance of the *Hanse-Towns*, art. 58, is to the same effect. *Valin*, in his Commentary on the *French* ordinance, restrains the necessity of this consent of the owners to the presence of all or the greater part of the owners, or of one appointed to act for all; and says, that if in such a case the master make a contract without their consent, the owners may annul it, and make another by their own authority. But the master himself will be answerable for the non-performance of it. This doctrine is also adopted by his countryman *Pothier* (m).

It is true, indeed, that this principle of the maritime law, by which the ship itself, in specie, is considered as a security to the merchant, who lades goods on board of it, cannot be carried into effect in this country, because the Court of Admiralty, in which alone proceedings can be carried on against the ship, has no jurisdiction in such a case. But I apprehend the owners may be made responsible, either by a special action on the case at the common law, or by a suit in equity, for the faithful performance of the

(i) An instance of a sentence in Spain against master and ship for barratry and deviation by the master, who had let the ship by a charter-party, is mentioned in an anonymous case in 2 Ch. Ca. 238.

(j) *Les Us et Coutumes de la mer*. p. 72.

(k) *French Ordinance*, liv. 3, tit. 1; *Des Chartes-parties*, art. 11; and see liv. 1, tit. 14; *De la saisie des vaisseaux*, art. 16.

(l) *Liv. 3, tit. 1; Des Chartes-parties*, art. 2.

(m) *Pothier, Charte-partie*, num. 48.

stipulations of a charter-party made by the master under the circumstances before mentioned.

3. The general rule before laid down, *viz.* That the owners are bound by every lawful contract made by the master relative to the usual employment of the ship, is proved, as to the case of a *general* ship, by the following judicial authorities.

In the case of *Boson v. Sandford & others* (n), which was an action brought against some of the part-owners of a ship employed in the coasting trade between *Exeter* and *London*, to recover the value of goods lost, which had been delivered to the master at *Exeter* without the knowledge of the owners, to be conveyed from thence to *London*; the Court held that the owners were answerable for a loss under such circumstances, but decided the case against the plaintiff, because the action was brought against some only, and not against all the part-owners.

In the case of *Boucher v. Lawson* (o), which was an action brought against the owner to recover the value of *Portugal* coin delivered to the master at *Lisbon*, to be conveyed to *London*, and and of which by the usage of that particular trade the master was to receive the freight to his own use, and which the master had embezzled; the Court held that, if it had appeared that the ship was employed in carrying goods for hire, the owner would have been answerable for this loss; for although the exportation of coin was prohibited by the laws of *Portugal*, yet the importation of it into this country was allowed by our laws, and so the trade was lawful here; and it was of no consequence, whether the master was rewarded for his services by wages paid by the owner, or by receiving part of the earnings of the ship: but as it did not appear that the ship was employed in carrying goods for hire, but for any thing that appeared in the case, the ship might have been sent to *Lisbon* for a special purpose, and if so (as the Chief Justice said) no man could say that the master, by taking in goods of his own head, could make the owners liable: it was decided that the plaintiff should not recover.

The facts of the case of *Ellis v. Turner & another* (p), which

(n) *Boson v. Sandford and Others*, Carth. 58; 3 Lev. 258; 3 Mod. 321; 1 Show. 29, 101.

Note.—It would now be held, that, as the defendants had not pleaded in abatement, they could not avail themselves of

the ground, upon which this case was decided against the plaintiff. See part 1, ch. 3, sec. 13, p. 82.

(o) Rep. temp. Hardwicke, p. 85.

(p) 8 Ter. Rep. in K. B. p. 531.

was an action brought against the owners for the value of goods damaged by the sinking of their vessel, were as follows: The vessel was employed in carrying goods from *Hull* to *Stockwith*, and to *Gainsborough*, which is a little further than *Stockwith*, but the freight was the same for conveyance to either place. On former voyages the goods destined to *Stockwith* had sometimes been delivered there on the way to *Gainsborough*, and at other times carried forward to *Gainsborough*, and delivered at *Stockwith*, on the return to *Hull*. The goods in question were delivered to the master on his express undertaking to deliver them at *Stockwith* on his way to *Gainsborough*. This particular undertaking was made by the master without the privity of the defendants, but he had a general authority from them to receive and convey goods for the customary freight from *Hull* to *Stockwith* and *Gainsborough*. The defendants had previously given public notice, with which the plaintiff's agent who shipped the goods, was acquainted, that they would not be answerable for any loss or damage that might happen to any cargo, unless occasioned by the want of ordinary care and diligence in the master and crew, in which case they would pay *ten per cent.* upon the loss, provided such payment did not exceed the value of the vessel, but that they were willing to insure against all accidents upon receiving extra freight in proportion to the value. No agreement had been made for the payment of extra freight for the goods in question. The vessel took in other goods to be delivered at *Stockwith* in the present voyage, and arrived safely at that place. The master delivered some of the other goods there, and was requested by the wharfinger to deliver all, that were destined for that place, but without the knowledge of the defendants refused to deliver the others, alleging that they were stowed below the goods destined to *Gainsborough*. On the way from *Stockwith* to *Gainsborough* the vessel sunk, without any want of ordinary care in the master or crew, and the goods in question were damaged. The Court held that the plaintiff should recover the amount of his loss. And Lord *Kenyon* said, 'As the vessel reached *Stockwith* in safety, and might have delivered the goods there, I think this action may be maintained. For though the loss happened in consequence of the misconduct of the defendants' servant, the superiors (the defendants) are answerable for it in this action. The defendants are responsible for the acts of their servant in those things, that respect his duty under them, though they are

not answerable for his conduct in those things, that do not respect his duty to them; as if he were to commit an assault upon a third person in the course of his voyage."

It may be observed, that in each of the above cases the contract upon which the action was brought, was made by the master without the particular knowledge of the owners. In the first, it was made in the course of the usual employment of the vessel, and therefore the Court held the owners to be bound to the performance as a general rule, although they thought the particular suit improperly brought. In the second, the contract was not made, or at least did not appear to have been made, in the course of the usual employment of the ship, and therefore the owner was not bound by it. In the last, the contract was made in the course of the usual employment of the ship, and therefore it was considered to be a contract made in substance by the owners.

From the decision of the last of the above cases, it seems also to follow, that if the master make a particular engagement or warranty, relating to the conveyance of merchandize according to the usual employment of the ship, the owners will be bound by such engagement or warranty, although made without their knowledge. And the law was so laid down by Lord *Kenyon* in his directions to a jury upon the trial of an action (*q*) brought by a merchant against the owners of a ship on a warranty, that the ship should sail with convoy from the place of rendezvous, which had not been complied with. A broker in *London* had been employed by the master to advertise the ship as a general ship, bound to *Hamburg*; and in the printed papers the broker had inserted a clause purporting that the ship was to sail with convoy from the place of rendezvous. There was no evidence given either of the assent, or dissent, of the defendants (the owners) to this warranty, or of their knowledge of it. But there was contradictory evidence upon a question made at the trial, whether the master had forbidden the broker to insert this clause. His lordship however told the jury, that he thought that point quite immaterial, for as the broker was authorized to advertise the ship, the owners were answerable to strangers for his acts, although he had exceeded his authority; and must seek their remedy against him. And the plaintiff succeeded in the cause.

From this rule of law, by which the owners are bound to the

performance of these contracts, it follows as a corollary, that they must answer for a breach of them, although committed by the master or mariners against their will, and without their personal fault.

4. But if the owners themselves have made a special contract for the employment of their ship, the master cannot, by the general and implied authority of his character as master only, annul such a contract, and substitute another for it with the other contracting party (s).

It seems also, that the master of a trading ship, entrusted to his command for the purpose of procuring goods on freight, cannot bind the owners by an engagement to carry goods free of freight. Such an engagement certainly will not be within the scope of his authority as above described (t).

5. The great responsibility, which the laws of commercial nations cast upon the owners for the acts of the master in this and other cases, has appeared to many persons, at first view, to be a great hardship; but laying aside all consideration of the opportunities of fraud and collusion, which would otherwise be afforded, it should always be remembered that the master is elected and appointed by the owners; and by their appointment of him to a place of trust and confidence, they hold him forth to the public as a person worthy of trust and confidence; and if the merchants, whom he deceives, could not have redress against those who appointed him, they would often have just reason to complain that they had sustained an irreparable injury through the negligence or mistake of the owners, as the master is seldom of ability to make good a loss of any considerable amount.

(s) By Lord Ellenborough, Ch. J., in *Burgen v. Sharpe, and Others*, 2 Camp. 629.

(t) *Dewell v. Moxon and Another*, 1 Taunt. 391.

CHAPTER III.

OF THE AUTHORITY OF THE MASTER WITH REGARD TO REPAIRS
AND OTHER NECESSARIES FURNISHED TO THE SHIP.

1. The obligation, to which the master of a ship may subject the owners to pay the charge of repairing their ship, and the price of stores and provisions supplied for the use of it, or to repay money advanced for those purposes, is sometimes *direct*, furnishing an action against themselves personally; sometimes *indirect*, to be prosecuted by a suit against the ship. It is proposed in the present chapter to consider it distinctly under each of these forms.

2. It should be premised, however, that the master is always personally bound by a contract of this kind made by himself, unless he takes care by express terms to confine the credit to his owners only (*a*). But such a contract made by the owners themselves (*b*), or under circumstances which show that credit was given to them alone (*c*), gives the creditor no right of action against the master.

It should be observed also, that the owners here spoken of are not in all cases the persons in whom the absolute legal title of the ship may be vested, but rather those from whom the master derives his authority, and whose agent he is, on the particular occasion. Some remarks have been offered on this head in the first chapter of this treatise (*d*). The owners of a packet employed by the Government to carry the mail, are answerable for stores ordered by the captain, although he is nominated by the postmaster-general (*e*).

3. And first, as to the *personal* obligation of the owners.

(*a*) Rich v. Coe, Cowp. 636. at Guildhall, Cases temp. Hardwicke, 376.
 (*b*) Farmer v. Davis, 1 Ter. Rep. in (d) Ante, p. 24.
 K. B. 108. • (e) Stokes v. Carne and Others, 2
 (c) Hoskins v. Slayton, before Lee, J., Camp. 339.

I have in the preceding chapter stated the nature and grounds of the owners' obligation, in the case of contracts made by the master for the carriage of merchandize in their ship. Their obligation in the case of his contracts now under consideration, is of the same nature, and depends upon the same principles; for, as those relate to the employment of the ship, so these relate to the means of employing it; and accordingly we find the obligation of the owners in both cases laid down in the very same parts of the civil law (*f*), and treated under one head. And as the master in general appears to all the world as the agent of the owners in matters relating to the usual employment of the ship, so does he also in matters relating to the means of employing the ship: the business of fitting out, victualling, and manning the ship, being left wholly to his management in places where the owners do not reside, and have no established agent; and frequently also even in the place of their own residence. His character and situation furnish presumptive evidence of authority from the owners to act for them in these cases, liable indeed to be rebutted by proof that they, or some other person for them, managed the concern in any particular instance, and that this fact was actually known to a particular creditor, or was of such general notoriety, that he cannot be supposed to be, because he ought not to have been, ignorant of it, or that they were by the terms of the contract expressly excluded (*g*).

It is scarcely necessary to remark that the master's contract with the mariners employed in the navigation of the ship, is one of those which are obligatory upon the owner; but it is proper to mention, because the point has once been contested, that his contract with an occasional pilot is of the same nature (*h*).

In order, however, to constitute a demand against the owners, it is necessary that the supplies furnished by the master's order should be *reasonably fit and proper for the occasion*, or that money advanced to him for the purchase of them should at the time appear to *be wanting for that purpose*. The contrary in either case would furnish a strong presumption of fraud and collusion on the part of the creditor. The proper mode of ascer-

(*f*) Dig. De Exercitoria actione, 14 l. 1, 8, and 9, and 14 l. 7.

(*g*) Bland ex parte, 2 Rose, 91.

(*h*) The Nelson, Main, 6 Rob. A. R. 227.

taining what is necessary, is to ask what a prudent owner would himself have done had he been present (i).

It is true indeed that Lord Chancellor *Hardwicke* once entertained a doubt as to the effect of contracts of this kind made by the master under the orders of a managing owner, and directed a trial at law, to determine whether or not the other owners were chargeable (k). But in an earlier case (l) where the master of a ship, having bought provisions and stores upon credit, failed, and the tradesmen sued the part-owners in the Court of Chancery for the price; the Court (m), considering the master as a servant to the owners, decreed that they should pay in proportion to their shares, and said, that "*if the owners paid their servant, yet if he paid not the creditors, they must stand liable*" (n). And in an action at law (o), the rule was said to be, that *primd facie* the repairer of a ship has his election to sue the master, who employs him, or the owners; but if he undertakes it on a special promise from either, the other is discharged.

In the cases before-mentioned the facts appear to have happened in *England*. In a case (p) tried before Lord *Kenyon* at

(i) See *Webster and Another v. Seekamp and Others*, 4 B. & A. 352.

(k) *Buxton v. Snee*, 1 Vesey, 154, A D. 1748.

(l) *Speering and Others v. Degrave and Others*, 2 Vern. 643; A. D. 1709.

(m) Lord Chancellor *Cowper*, I presume.

(n) See also *Stewart v. Hall and Others*, 2 Dow. 29.

(o) *Garnam v. Bennet*, 2 Stra. 816.

(p) *Evans v. Williams*, Sit. p. Trin. T. 28 Geo. 3. A new trial was moved for in the following Michaelmas Term, and upon argument refused.

In France, the master of a ship was formerly held to possess this power of charging the person of his owners for money borrowed for the necessities of the ship in the course of a voyage. See *Valin* on the French Ordinance, liv. 2, tit. 1. *Du Capitaine*, art. 19, tom. i. p. 443. But *Emerigon*, tom. ii. p. 458, &c., cites four decisions of the courts of his country, (two of which were reversals of judgments pronounced in the Admiralty of *Rochelle*,) by which the owners were

declared not to be personally responsible, the ship having perished on the voyage; but in each of those cases, the master was held liable to pay the debt; and, in the last of them, it was determined that he had a right to be repaid out of the proceeds of goods belonging to the owners, which had been landed in a former part of the voyage, and they were ordered to account to him for the value of them. The learned author speaks of these decisions as an alteration of the law of his country, and cautions masters of ships against drawing bills upon their owners in such cases. The caution should also be extended to those who may be in a situation to advance money on such occasions, and who should understand that they cannot, by the law of France, have the personal security of the owners of the ship. The new doctrine appears to be founded on a new construction of that article of the ordinance, which declares that the owners shall be responsible for the acts of the master, but shall be discharged on abandoning the ship and freight. Liv. 2, tit. 8, *Des Proprietaires*, art. 2.

Guildhall, where the master of the ship had borrowed money *abroad* for the use of the ship, his Lordship held that the lender might recover against the owners the money laid out upon the ship; and this opinion was afterwards confirmed by the Court of King's Bench. It was proved at the trial that the master could not obtain money on the security of the ship alone, which, in the event that happened, would have been more beneficial to the owners because the ship perished on the voyage home. In such an event the *Consolato del Mare* expressly declares the owners not to be personally responsible (q).

Another case (r), in which a claim was made upon the owner for money advanced to the master abroad in the course of a foreign voyage, underwent a great deal of discussion, and seems worthy of particular notice. Sir *Humphrey Jervis*, who lived in *Dublin*, being sole owner of a ship lying at *Bristol* under the command of *S. Symons*, and originally intended to be freighted from thence to *Ireland*, being disappointed in that voyage, and informed by *Symons* that a freight could be got for the *West Indies*, if he approved of it, wrote to *Symons* to accept such freight, and to take up as much money upon *bottomry*, as would fit out the ship, and provide a stock for port-charges. *Symons* thereupon entered into a charter-party with *Cary*, a merchant at *Bristol*, for the hire of the ship for a voyage to the *West Indies* and back to *Bristol*; and by the terms of the charter-party, the owner was to pay the seamen's wages, and provide all necessaries for the ship; but *Symons*, not being in cash for this purpose, borrowed 200*l.* upon *bottomry*, of *Cary*, and also obtained a letter of credit from him to his correspondents in *Jamaica*, for whatever money he might further want, either to repair the ship, or furnish her with provisions, or to pay the seamen's wages. The ship proceeded to *Jamaica*, and there *Symons*, the master, by virtue of *Cary's* letter of credit, took up several sums, amounting to 789*l.* On the return from *Jamaica* to *Bristol*, the ship was lost. Sir *Humphrey Jervis* refused to pay *Cary* the 789*l.*, and *Cary* thereupon sued him for the recovery of it in the Court of Chancery in *Ireland*, alleging that the money was expended in repairs and other necessary purposes; and, he dying during the suit, the proceedings were revived and carried on against his administrators. The

(q) Cap. 240.

(r) *Cary v. White*, 1 Bro. Par. Cases, 284, A.D. 1710.

Lord Chancellor of *Ireland*, assisted by one of the Chief Justices and another judge, at first decreed that *Cary* should recover so much of the money claimed, as upon a trial at law should be found to have been thus expended ; but the cause was afterwards re-heard, and the Court declared that *Cary* was not entitled to any relief. Upon this *Cary* appealed to the *British* House of Lords, before whom the cause was heard. On behalf of *Cary* it was argued, "That at common law whatever is done by a servant, which is for the benefit of his master, and within the *trust* and *duty* of his place, binds the master, as if done by himself ; and in a voyage, the master of a ship is the owner's servant, whose duty requires him to provide necessaries for the ship, it being the owner's interest that they should be provided ; so that whatever the master necessarily takes up and employs for that purpose, the owner is bound to pay ; and that, by the custom of merchants, if the master be supplied with necessaries for the ship by the order or credit of any freighter, the owner is liable to pay such freighter, and on that ground it is customary for freighters to furnish masters of the ships they take to freight, with letters of credit for whatever money they may happen to want, for the necessary service of the ship."

On the other side it was contended, "That it would be of most dangerous consequence for the master of a ship to charge the person or estate of his owner with what money he should take up on pretence of providing for the ship, without an express power or authority for that purpose ; for that the law of merchants had never carried it further than to invest the master with a power of mortgaging, or charging the ship or cargo with such money. That in the present case the money could not be laid out by the appellant or his factors, upon the credit of Sir *Humphrey Jervis*, not only because he was a total stranger to them, but principally because he had for two years before failed in his circumstances, and lost his credit ; nor was it even pretended that Sir *Humphrey* ever gave any authority to the master to take up money otherwise than on *bottomry*. That if Sir *Humphrey's* person or estate was in all events liable to make good this 789*l.*, besides the 200*l.* advanced on the *bottomry bond*, and which, in case the ship had returned safe to *Bristol*, he would have been answerable for, he must of necessity have been a very great loser, as the ship cost at first but 700*l.*, and her freight in that event would not have brought above 600*l.* ; and therefore, if Sir *Humphrey* himself had

been at *Jamaica*, he never would have consented to take up money for preserving that, which would have been so much to his loss. And that the appellant's interest in the ship, by having 200*l.* on *bottomry*, at a large interest to be paid on her return, was much greater than Sir *Humphrey's*, and therefore whatever money was laid out in *Jamaica*, ought to be considered as laid out on the account of the appellant, but yet to be discounted out of the ship and freight, so far as it would extend, on its return." The House of Lords thought the owner personally responsible, *if the allegations of Cary, as to the necessity of the expenditure, were true*; and directed a trial by jury in the Court of Common Pleas in *Ireland*, to ascertain whether any, and what sums of money, were *necessarily* laid out by, or by the order of *Cary*, for the payment of seamen's wages, provisions, or otherwise, for the *necessary repairs and use of the ship during the voyage*, and decreed those sums to be paid to *Cary*, and directed the Lord Chancellor of *Ireland* to order the necessary steps for the trial of the cause. The cause (*s*) was accordingly tried at the bar of the Court of Common Pleas in *Ireland*, and the jury declared by their verdict, that nothing had been *necessarily* expended for these purposes by, or by the order of *Cary*. *Cary* applied to the Lord Chancellor, who ordered a second trial, and the cause was again tried at the bar of the Court of Common Pleas in *Ireland*, before another jury, who gave the same verdict, and the Lord Chancellor thereupon dismissed *Cary's* suit with costs from the time of the judgment of the House of Lords. Upon this *Cary* again appealed to the House of Lords; but no person appearing before the House to support his appeal at the day appointed, the House dismissed it with costs.

This case, while it establishes the principle of the personal responsibility of the owners, shews also that the creditor is required to prove the actual existence of the necessity of those things, which give rise to his demand. The authority of the master is to provide *necessaries*; if, therefore, a person trusts him for a thing not necessary, he trusts him for that which it is not within the scope of his authority to provide, and consequently has no right

(*s*) The subsequent proceedings are not mentioned by Brown. This account of them is taken from the printed cases delivered to the House of Lords, and the

Journals of the House, 1st June, 1717. The account of the evidence given at the trials, contains nothing of general interest.

to call upon his principal for payment. In the words of Lord *Ellenborough*, "The money supplied must not be understood of an indefinite supply of cash, which the master may dissipate, but only such as is warranted by the exigency of the case, as for the payment of duties or other necessary purposes" (t). And it must be advanced to the master expressly for the use of the ship, otherwise, although expended for that purpose, the owner will not be responsible for it to the lender (u).

From what has been said, it follows, that if the master expend money of his own for these purposes, he has a right to call upon the owners to repay him (v).

In an action against the owner for money advanced in *England* to the master, the following circumstances appeared on the trial. The ship, after an absence of four years and a half, during which she had been engaged in his Majesty's transport service, was in the port of Portsmouth, upon her release from quarantine. Having received orders from the transport board to proceed to Deptford, the master borrowed the money in question to pay seamen's wages, Portsmouth being a port of discharge, and to pay tradesmen's bills for articles supplied for the use of the ship there. On the trial the plaintiff was nonsuited, but finally the Court of Exchequer set aside the nonsuit, and ordered a verdict to be entered for the plaintiff, for such sum as should, on a reference be found due, for the seamen's wages (x).

Secondly, as to charges upon the *ship in specie*.

Every man, who had repaired, or fitted out a ship, or lent money to be employed in those services, had by the law of *Rome* (y), and still possesses in those nations which have adopted the Civil Law as the basis of their jurisprudence, a privilege, or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract, or agreement, subjecting the ship to such a claim (z).

(t) *Rocher v. Busher*, 1 Starkie, 27. See also *Palmer and Others v. Gooch*, 2 Starkie, 428; *Boyce v. Attorney-General*, 50.

(u) *Thacker v. Moates*, 1 M. & Rob. 79.

(v) *Roccus*, Not. 34, 35.

(x) *Robinson v. Lyall*, 7 Price, 592. See as to the incidental authority of masters of ships as resulting from their official capacity, the recently published Commentaries on the law of agency, as a branch of commercial and maritime jurisprudence, by Mr. Justice Story, p. 91 to 97.

(y) Dig. 42, 5, 26. "Qui in navem extruendam vel instruendam, credidit, vel etiam emendam, privilegium habet." And id. l. 34, "Quod quis navis fabricandæ, vel emendæ vel armandæ, vel instruendæ, causâ, vel quoquo modo, crediderit, vel ob navem venditam petat, habet privilegium post fiscum." See also Dig. 20, 4, 5, and 6; Novell, 97, c. 3; Domat's Civil Law, book 3, tit. 1, sec. 5; and Vinnius in Peckium, p. 99 and 233.

(z) See particular regulations on this subject, in the French Ordinance, liv. 1,

This privilege exists in *France* not only while the ship remains in the possession of the owner, but even after a sale to a third person, for some period of time (a). Lord *Mansfield* is reported to have said generally in a case, depending for judgment in the Court of King's Bench, that a person, who supplies a ship with necessaries, has not only the personal security of the master and owners, but also the security of the specific ship (b). But in a recent case, to which I have more than once had occasion to refer, Lord *Kenyon*, alluding to two cases that will be presently mentioned, expressed a doubt whether the doctrine of Lord *Mansfield* on this subject was not too generally laid down (c); and upon the view of the decisions, which I am about to quote, one of which was pronounced by Lord *Mansfield* himself, it appears that the Law of *England* has not adopted this rule of the Civil Law with regard to repairs and necessaries furnished here in *England*. A shipwright indeed, who has taken a ship into his own possession to repair it, may not be bound to part with the possession, until he is paid for the repairs, any more than a tailor, smith, or other artificer, in regard to the object of his particular trade (d), unless there be a special agreement to give credit for a certain period, or such an usage in the trade as is equivalent to a special agreement (e). But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman, who has provided ropes, sails, provisions, or other necessaries for a ship, are not by the Law of *England* preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands (f).

Thus where one *Clement* (g), who had supplied sails and other necessaries for the use of a ship in a port in *England*, instituted a suit in the Court of Admiralty against the persons who were

tit. 14; De la saisie et vente des vaisseaux.

(a) It seems to be a year. French Ordinance, liv. 1, tit. 12, des prescriptions, &c., Art. 3.

(b) *Rich v. Coe*, Cowp. 636, Trin. T. 17 Geo. 3. An expression of the same import was also used by his lordship in the case of *Farmer v. Davis*, 1 Term Rep. K. B. 109.

(c) *Westerdell v. Dale*, 7 Term Rep. K. B. 312.

(d) *Bland*, ex parte, 2 Rose, 91; *Franklyn v. Hosier*, 4 B. & A. 341.

(e) *Raitt v. Mitchell* and Another, 4

Camp. 146.

(f) See *Hill*, ex parte, 1 Maddocks, 61.

(g) *Hoare v. Clement*, 2 Show. 338, Hil. Term, 35 and 36 Car. 2. It seems that the prohibition would have been general, if the master and former owner had applied for it, for the Court of Admiralty had no jurisdiction over the person in this case. See *Cradock's Case*, 2 Brownlow, 37, reported also in *Owen*, 122, by the name of *Leigh v. Burleigh*, 7 Jas. 1. I have not cited this last case as an authority for the text, because it is not said in either of the books, that the suit in the Admiralty was against the ship as well as the person.

master and owner at the time of the supply, and also against the ship, and one *Hoare*, who had afterwards purchased the ship, the Court of King's Bench, on the application of *Hoare*, granted a prohibition to the Court of Admiralty, to stay the proceedings against him and the ship. Again (*h*), where one *Ballam* instituted a suit in the Admiralty against a *Norwegian* ship, for payment of the price of a cable and anchor delivered on board the ship to the master in the River *Thames*, and an application was made to the Court of King's Bench to prohibit the Court of Admiralty from proceeding in the cause, against which and in favour of the proceedings in the Admiralty it was argued, that the want of the cable and anchor was occasioned by stress of weather at sea, and that the party would be without remedy if a prohibition should be granted, because the master was dead, and the owners were foreigners; the Court of King's Bench thought the ship not liable to the suit; *first*, because it did not appear that the ship was in her voyage, when she became in distress for want of a cable and anchor, *and at the time of the contract*: *secondly*, because there was no actual hypothecation; and said, that although by the maritime law every contract with the master of a ship implied an hypothecation, yet it was otherwise by the Law of *England*, unless expressly so agreed. And (*i*) where a ship had been sold, and the money brought into the Court of Chancery in a cause there depending, and upon inquiry into the nature and extent of the demands of the several parties in the cause upon the proceeds of the sale, it appeared, that the plaintiff, being master of the ship, had, by the desire of one of the defendants, the owner, employed several tradesmen in *London* to do work to, and find provisions and materials for the ship, for which he (the master) had promised to pay, and of which he had been forced by suit at law to pay a part; Sir *Joseph Jekyl*, the Master of the Rolls, declared, (and decreed accordingly) that this demand was not a lien on the ship, but that a demand of the master for wages paid by him to the mariners, and for money disbursed by him on the ship's account in the course of a foreign voyage, was a lien on the

(*h*) *Justin v. Ballam*, Mich. Ter. 1 Anne, Salk. 34; 2 Lord Raym. 805. Both reporters say that the Court awarded a prohibition, but the latter adds, that at the importunity of the defendant's counsel, the plaintiff was ordered to declare.

No subsequent proceedings are any where mentioned.

(*i*) *Watkinson v. Bernardiston*, 2 P. Wms. 367, and Mr. Coxe's note thereon, 2 Eq. Ca. Ab. 512; A. D. 1726.

ship: and in this case it was said by the Master of the Rolls, "That if a ship be in the River *Thames*, and money be laid out there, either in repairing, fitting out, new-rigging, or apparel of the ship, this is no charge upon the ship; but the person thus employed, or who finds these necessaries, must resort to the owner thereof for payment; and in such a case; in a suit in the Court of Admiralty to condemn the ship for non-payment of the money, the courts of Law will grant a prohibition; and therefore if the owner, after money thus laid out, mortgages the ship, though it be to one, who has notice that the money was so laid out, and not paid; yet such mortgagee is well entitled, without being liable for any of the money thus laid out for the benefit of the ship as aforesaid; and the ship is no more liable for this money, than a carpenter laying out money in the building of a house, has a lien upon the house in respect thereof; though by the law of *Holland* he has; but this not being the law of *England*, such carpenter must resort to those who employed him, or to the owner of the house, for his money. But it is true, *that if at sea*, where no treaty or contract can be made with the owner, the master employs any person to do work on the ship, or to new rig, or repair the same, this, for necessity and encouragement of trade, *is a lien upon the ship*, and in such case the master, by the maritime law, is allowed to hypothecate the ship."

6. But although the master may hypothecate the ship for necessary repairs, in the course of a foreign voyage, yet that part of the opinion of Sir *Joseph Jekyl*, which relates to his lien on the ship for his disbursements about such repairs, has been overruled in a late case, in which the point was much considered. One *Hussey*, the master of a vessel employed in the *South Sea* Fishery, having in the course of the voyage, for the necessary repairs and furniture of the ship, expended a considerable sum of money, and given his own promissory notes, and drawn bills of exchange upon his owner, finding at his return to *London* that the owner was become a bankrupt, and the bills were dishonoured; and being obliged to discharge some of them, and answerable for the others, endeavoured to retain the ship in his own possession as a security, but was forcibly deprived thereof by the assignees of the bankrupt, or other persons claiming an interest in the ship and cargo. Upon this he instituted a suit against these persons in the Court of Chancery, to restrain them from disposing of the ship, until his claim should be satisfied. And

on his part it was contended, that he had a lien upon the ship for the money thus expended and debts incurred by him. The Lord Chancellor, considering this to be properly a legal question, sent the case to the Court of King's Bench for the opinion of the learned Judges of that Court (*k*), and they were all of opinion that the master had not a lien upon the ship (*l*).

Again, where a ship was sold under the authority of the Court of Chancery, and a person, who had previously repaired it in *England* by order of the master, acting under the authority of the ship's husband, claimed the payment of his demand out of the money produced by the sale in a suit against the surviving part-owners, and the representatives of the others, who were dead; and it became necessary to determine whether the plaintiff's demand constituted a lien upon the ship, because, if it did, he was entitled to payment according to the prayer of his bill: Lord Chancellor *Hardwicke* said, "Certainly by the maritime law the master has power to hypothecate both ship and cargo for repairs, &c. during the voyage; which arises from his authority as master, and the necessity thereof during the voyage, without which both ship and cargo would perish; therefore both that, and the law of this country, admit such a power. But it is different, where the ship is in port *infra corpus comitatus*, and the contract for repairs, &c. made on land in *England*; then the rule of that law must prevail. I know no case where the repairs, &c. whether it was by part-owners, or sole-owner, master or husbands, have been held a charge or lien on the body of the ship. *Watkinson v. Barnardiston*, 2 *Wms.* 367, being a direct authority to the contrary; and if the ship in the river *infra corpus comitatus* should be proceeded against and stopped for such debt, the courts of law would issue a prohibition, the contract being on land and not arising from necessity." And his Lordship dismissed the bill so far as it sought relief against the body of the ship, or the money arising by the sale thereof: but expressing a doubt, as to the personal charge upon the owners in such a case, directed a trial at law upon that question (*m*), as I have already mentioned (*n*).

And in another case, which happened very soon afterwards,

(*k*) See the case of *Hussey v. Christie and Others*, 13 *Ves. jun.* 594; 3 *Swanston*, Rep. 139; *ex parte Hackett*, 3 *Ves. & B.* 135.

(*l*) *S. C.* 9 *East*, 426.

(*m*) *Buxton v. Snee*, 1 *Ves.* 154, Nov. 1748.

(*n*) *Ante*, p. 117.

where a person having repaired a ship here, and delivered it to his employer, who was become a bankrupt, had obtained possession of the money, for which the ship had been sold, and insisted before Lord Chancellor *Hardwicke*, that he had a specific lien on the ship for the repairs, and was not obliged to prove his demand as a debt under the commission; the Lord Chancellor said, that although the law of *Holland* gave a person who repaired a house, or ship, a specific lien, there was no such law in *England*, and that he must account to the assignees of the bankrupt for the money in his hands arising from the sale of the ship, and come in under the commission for the debt due to him for repairs; and his Lordship made an order accordingly (o).

And in a case (p) that came before the Court of King's Bench very soon after the determination of the particular case, in which Lord *Mansfield* is reported to have delivered the doctrine before quoted, wherein the master of a ship, of which the owner was become bankrupt, insisted upon a right to retain the ship from the assignees of the bankrupt, as a security both for his own wages, and for the expense of repairs, stores and provisions ordered by himself, and for which he was liable to pay, and after a demand made of the ship by the assignees had actually paid, Lord *Mansfield* said, "As to the stores and repairs, it is a strong answer to the claim, that, when the demand was made by the assignees, the master had not paid. But if there was any lien originally, it was in the carpenter: the master could not by paying him be in a better situation than his, and *he* had parted with the possession, so that he had given up his lien, if he ever had one. The other creditors had none. Work done for a ship in *England* is supposed to be on the personal credit of the employer. In foreign parts the master may hypothecate the ship." The master, therefore, having no claim on the ship for wages and other disbursements, can have none upon the freight, as lien upon freight is consequential to lien upon the ship (q).

In a case (r), which was brought by appeal from the Court

(o) *Ex parte Shank and Others*, 1 Atkins, 234. August 1758.

(p) *Wilkins v. Carmichael*, Hil. Ter. 19 Geo. 3, Doug. 101.

(q) *Smith and Another, Assignees of Kirkpatrick a bankrupt v. Plummer and*

Others, 1 B. & A. 575.

(r) *Wood and Others v. Hamilton*, decided in Dom. Proc., 15th June, 1789. The printed papers are drawn up with great care and learning on both sides, and contain much valuable information.

of Session in *Scotland* to the *British* House of Lords, the Lords determined that the persons who had repaired and furnished a ship in *Scotland*, the place of the owner's residence, had no claim upon the value of the ship itself for the payment of their demands. The owners of the ship had become bankrupts, and several persons, who had repaired and furnished it at different periods, instituted a suit against the trustee of the bankrupt's estate, claiming payment out of the proceeds of the sale of the ship in exclusion of the other creditors of the bankrupt, and insisting that all of them, or at least those whose demands arose since the last voyage made by the ship, and in order to fit her out for another voyage, had by the law of *Scotland*, and of other *European* nations, *England* only excepted, a right of hypothecation or preference for the amount of their respective demands. The cause was heard and re-heard several times in *Scotland*, and different decisions pronounced there, some in favour of the claim, and others against it. The ultimate decision in *Scotland* was against the claim, founded principally, as it seems, upon a desire to render the law of *Scotland* conformable to the law of *England* on this subject^(s); for such a claim had been frequently allowed in the Courts of *Scotland* during a period of fourscore years preceding this cause; and this decision was affirmed by the House of Lords on the appeal.

I have detailed these cases with the more particularity, in order to prevent any mistake from the general doctrine delivered by Lord *Mansfield* in the case of *Rich v. Coe*, which has sometimes been cited as an authority up to the full extent of the terms in which it was expressed.

7. There is, however, a determination of the Court of Admiralty, that should be mentioned in this place. An *American* ship was supplied in the river *Thames*, by certain merchants of *London*, with stores and ammunition for a voyage to *Venice*, and having performed the voyage and returned to *London*, was sold under a decree of the Court in a suit instituted by the mariners for their wages. After payment of the wages, a surplus remained in the registry of the Court. The master had returned to *America* and died; and the owner was insolvent there. The merchants applied

(s) In the case of *Jamieson and Others v. Laurie*, 6 Bro. P. C. p. 474, 2 edit., this is expressly said to have been the ground of the decision. Dr. Wynne's

opinion as to the English law, was taken in the course of the proceedings for the information of the Scotch Judges.

to the Court for payment of their demand out of this surplus; and in support of their application a distinction was taken between *English* and foreign ships. The learned Judge of the Court, after having had the cases looked into, said he found it had continued to be the practice of the Court to allow persons of this description to sue against proceeds remaining in the registry, notwithstanding prohibitions had been obtained on original suits instituted by them; and he referred to a particular case of the ship *Adventure*, in the year 1763, and decreed that payment should be made according to the application (t).

It is observable, that there was not in this case any person representing the owner to object to the application. It appears by the report that the proceeds had been previously attached on the part of a creditor, and that the attachment had been removed before the decree, but no particulars relating to it are mentioned (u).

(t) *The John, Jackson*, 3 Rob. A. R. 288.

(u) In most of the countries governed by the Civil Law, repairs and necessities form a lien on the ship herself. In England, the same doctrine for a long time prevailed in the maritime courts, (1 Hagg. Adm. Rep. 320, 325; 1 Roll. Abr. 533, Cro. Car. 296,) until after a long contest it was finally overthrown by the Courts of Common Law, and by the highest judicature in the country, the House of Lords, in the reign of Charles the Second. The submission of the Courts of Admiralty seems, however, to have been limited to the very letter of the prohibition; for, in a recent case, it appeared that the practice of paying material men out of the proceeds in the registry, arising from the sale of a ship under process of that Court, had existed for more than half a century, (the *Neptune*, 3 Hagg. Rep. 129). "This practice," said the late learned Judge of the Admiralty, (Sir John Nichol) "founded on principle; on the law civil and maritime; on the usage of other nations, and on the ancient practice of this Court, unchecked by prohibitions, except in the case of proceedings against the ship itself; this practice so founded and so allowed to grow up, I

shall not disturb," and accordingly pronounced for the claim of the material men with costs of suit, and that the same should be paid out of the Registry. But this decision was reversed on appeal by the Judicial Committee of the Privy Council, (2 Knapp's Cases, 94,) and the law, therefore, as stated in the text, may be considered as finally established.

In the Admiralty Courts of the United States, the rule of the Civil Law has been generally followed as to foreign ships, and in some of the States as to repairs in domestic ports. In the case of the *General Smith*. (4 Wheaton, Rep. 438,) the Supreme Court of the United States held, that where repairs have been made, or necessities furnished to a foreign ship, or to a ship in a port of a State to which she does not belong, the general Maritime Law following the Civil Law gives the party a lien on the ship itself for his security; and he may well maintain a suit in rem in the Admiralty to enforce his right. But in respect to repairs and necessities in the port or State to which the ship belongs, the case is governed altogether by the municipal law of that State, and no lien is implied unless it be recognized by that law, and accordingly, the Court decided it in that case, because

In the case of the same ship, a person who had acted as agent and broker to the ship in this country, afterwards applied by petition for payment of the balance of his account; but the petition was rejected, by reason of the general and unsettled nature of the account, which was thought more fit for the Court of Chancery, where alone cross-demands could be investigated.

8. We have seen by several of the preceding cases that the master may, in foreign parts, *hypothecate* the ship: and I propose in the next place to consider the nature of those instruments of contract by which a ship itself is expressly made security, and pledged by the master, for the repayment of a debt contracted with relation to it. It should be observed, that wherever the master may pledge the ship, he may pledge the freight also (*w*).

These contracts are usually called contracts by *bottomry*, the bottom or keel of the ship being figuratively used to express the whole body thereof; sometimes also, but inaccurately, money lent in this manner is said to run at *respondentia*; for that word properly applies to the loan of money upon merchandize laden on board a ship, the repayment whereof is made to depend upon the safe arrival of the merchandize at the destined port. In like manner the repayment of money lent on bottomry, does in general depend upon the prosperous conclusion of the voyage; and as the lender sustains the hazard of the voyage, he receives upon its happy termination a greater price or premium for his money, than the rate of interest allowed by law in ordinary cases. The premium paid on these occasions depends wholly on the contract of the parties, and consequently varies according to the nature of the adventure. And as the master of the ship may, under certain circumstances, pledge the ship by a bottomry contract, so also may the owners (*x*) or part-owners in any case, to the extent of

the common law, which was the law of Maryland where the repairs were made, did not give it for repairs on a domestic ship.

The Legislatures of New York and Pennsylvania have specially provided for material men, shipwrights, and artificers, a lien on the ships furnished or repaired by them; and in Louisiana, a like lien or privilege exists in virtue of the general Spanish Law.—See Mr. Justice Storey's

note to the American edition, p. 115.

(*w*) The *Gratitudine*, Mazzola, 3 Rob. A. R. 240, and the *Jacob. Baer*, 4 Rob. A. R. 245. See as to the extent of an hypothecation of the freight, the last section of this chapter.

(*x*) Pothier, vol. 3, p. 97; Emerigon, 375; Valin, liv. 3, tit. 5, art. 8; Bynkershoek, c. 515; Duke of Bedford, 2 Hagg. Adm. Rep. 294.

their respective interests; and this they not unfrequently do, in order to raise money for the outfit, when prudence dictates the propriety of such a measure, or the want of personal credit compels them to have recourse to it. The origin of these contracts is certainly very remote, and cannot now be accurately ascertained. It is said by a very learned writer (*y*), that they took their rise from the practice of allowing the master to hypothecate the ship in a foreign country, in order to raise money to refit. But this opinion may well be doubted; for although the practice of lending money upon maritime risks at a high premium was well known to the *Romans* before the time of *Justinian*, yet in those titles of the *Digest* and the *Code* (*z*), which expressly treat of this subject, no mention is made of contracts of this nature entered into by the master of a ship in that character, according to the practice which has since universally prevailed. And except for the purpose of securing the payment of maritime interest, actual hypothecation was not necessary to give the creditor a claim upon the ship, as I have already shown. This point, however, is rather a matter of speculative curiosity than of useful research, and therefore I shall pursue it no further.

9. The consideration of these contracts, when made by the owners or part-owners themselves, does not properly belong to this place; their legality, and the risks which the lender is to incur according to general rules, are very ably treated by Mr. *Park* and Mr. Serjeant *Marshall*, in their chapters on *Bottomry* and *Respondentia*. I shall only mention such circumstances relating to them, as are connected with the subject of hypothecation by the master; premising, however, that a total loss within the meaning of a bottomry bond, cannot happen if the ship exists in specie, although it may be so much injured in the voyage as not to be worth repairing and bringing to the ultimate place of destination, so as to constitute a total loss within the meaning of a policy of insurance on the ship (*a*).

10. The name of *bottomry* has been sometimes incorrectly applied to a contract, by the terms of which the ship itself is not

(*y*) 2 Black. Com. p. 457, c. 30, s. 3.

(*z*) De Nautico Fœnore; Dig. 22, 2; and Codex, 4, 33. See on this subject, *Park*, ch. 21; *Guidon*, ch. 18; *Emeri-*

gon, tom. 2, p. 380; and stat. 6 Geo. 1, c. 18, s. 12.

(*a*) *Thompson v. Royal Exchange Assurance Company*, 1 M. & S. 31.

pledged as a security, but the repayment of money, with a high premium for the risk, is made to depend upon the success of a voyage (b). This is rather a loan upon a particular adventure, to be made by a particular ship, than a loan upon the ship; and of course the lender has only the personal security of the borrower for the due performance of the contract. And it seems that loans have sometimes been made in this manner, and probably also with a pledge of the ship itself, to an amount exceeding the value of the borrower's interest in the ship, and such a contract is still legal in this country in all cases, except the case of ships belonging to the King's subjects bound to or from the *East Indies*; as to which the Legislature has enacted, "That all sums of money lent on bottomry or at respondentia, upon any ship or ships belonging to his Majesty's subjects bound to or from the *East Indies*, shall be lent only on the ship, or on the merchandize or effects laden, or to be laden, on board of such ship, and shall be so expressed in the condition of the bond, and the benefit of salvage shall be allowed to the lender, his agents or assigns, who alone shall have a right to make assurance on the money so lent, and no borrower of money on bottomry, or at respondentia as aforesaid, shall recover more on any assurance, than the value of his interest in the ship, or in the merchandizes or effects laden on board of such ship, exclusive of the money so borrowed, and in case it shall appear that the value of his share in the ship, or in the merchandizes or effects laden on board, doth not amount to the full sum or sums he hath borrowed as aforesaid, such borrower shall be responsible to the lender for so much of the money borrowed, as he hath not laid out on the ship or merchandizes laden thereon, with lawful interest for the same, together with the assurance and all other charges thereon, in the proportion the money not laid out shall bear to the whole money lent, notwithstanding the ship and merchandizes be totally lost" (c). This statute was introduced for the protection of the trade of the *East India Company*; and its rules must be complied with in the case of bottomry by the *master*.

By a former statute, all contracts or agreements made by

(b) Three forms of bonds of this sort are printed in the Appendix to the *Treatise of the Dominion of the Sea*, and

Body of Sea Law, p. 659, &c.

(c) 19 Geo. 2, c. 37, s. 5.

any of his Majesty's subjects, or any persons in trust for them, upon the loan of any money by way of *bottomry* on any ship in the service of *foreigners* bound or designed to trade within the limits of the *East India* Company's charter, or of supplying such ships with any provisions, stores, or necessaries, are made wholly void (*d*). This statute also applies to contracts of bottomry by the *master*.

11. With regard, however, to contracts of this sort, made by the owners themselves in this country before the beginning of a voyage, by the terms of which the ship is pledged as a security, it should be observed, that the lender has not the same convenient and advantageous remedy by suit in the Admiralty against the ship (*e*), as he has in the case of hypothecation for necessaries by the master in a foreign port; and if the contract relate to a *British* ship, and purport to be, either a present assignment of the ship, liable to be defeated on repayment of the money due at the end of the voyage, or a future assignment to take effect only upon failure of such payment, it seems that a compliance with the provisions of the register acts, mentioned in a preceding chapter with regard to the transfer of property in ships, is essential to the validity of the contract.

12. Neither does there seem any mode, by which a person, who advances money at *respondentia* upon goods laden and to be laden on board a ship on an outward and homeward voyage, can resort for the payment of his debt to the specific goods that may be brought back (*f*). In a case of money lent to the master of an *East India* ship, who executed a bond in the form (*g*) commonly used on such occasions, and having taken out goods from this country and sold them in *India*, and brought back others purchased there with the proceeds of the first, became a bankrupt before he had repaid the loan, and while part of the goods and the money produced by the sale of another part remained in the hands of the *East India* Company, in whose warehouses they were deposited for sale, according to the rules of that trade; the

(*d*) 7 Geo. 1, stat. 1, c. 21, s. 2.

(*e*) Dict. accord. by Holt, C. J., in *Johnson v. Shippen*, 2 Lord Raym. 983, and by Lawrence, J., in the case of *Busk v. Fearon*, B. R. Mich. T. 44, Geo. 3. This case is shortly reported in 4 East,

319, but this dictum of the learned Judge is not noticed. It was a case of a loan in England at *respondentia*, and the parties were British subjects.

(*f*) 2 Black. Com. 458.

(*g*) See Appendix, No. III.

Court of Chancery sent the following question for the determination of the Court of King's Bench, viz. "Whether the lender had by law, in respect to the money remaining due to him on the bond, any lien upon, or interest in, the money or goods remaining in the hands of the Company, or either of them, and whether the same, or either of them, were by law liable to satisfy what so remained due." The Court of King's Bench determined the question in the negative (*h*). It may be observed, that the instrument used on this occasion does not contain a direct and formal pledge of the goods.

13. A contract of hypothecation made by the master does not transfer the property of the ship, but only gives the creditor a privilege or claim upon it, to be carried into effect by legal process (*i*). It is contrary, therefore, to the nature of hypothecation, admitting the master's power to hypothecate the *cargo*, (as will be presently mentioned) (*k*), that he should engage to deliver the cargo in the first instance into the hands of the lender's appointee at the place of destination, so as to enable him to sell it and receive the proceeds for the use of the lender, without giving the merchant an opportunity of taking it into his own hands upon discharging the incumbrance; and consequently the master has no power to enter into such an engagement (*l*).

14. A contract of this sort is one of those matters which are technically called *Choses in Action*; and therefore the duty that may be created by it is not assignable by the Common Law of *England*, so as to enable an assignee to sue upon it in his own name, or to set off the amount against a demand upon himself, in our courts of common law; although such an assignment may be made available in a court of equity: and it is questionable whether a demand arising out of such a contract can be made the subject of a set-off under the statutes in the hands of the original party (*m*). § In the Admiralty, a bottomry bond is a negociable interest, which may be transferred and put in issue by the person so acquiring it (*n*). §

(*h*) *Busk v. Fearon and Others*, 4 East, 319. See *Glover v. Black*, 3 Burr. 1394.

(*i*) See *Johnson v. Shippen*, 2 Lord Raym. 984.

(*k*) Post. sect. 21, of this chapter.

(*l*) *Johnson v. Greaves*, 2 Taunt. 344.

(*m*) *Marshall v. Wilson*, at Guildhall, Dec. 18, 1811, before Lord Ellenborough, Chief Justice.

(*n*) *The Rebecca*, 5 Rob. Adm. Rep. 102.

15. It is obvious that a loan of money upon bottomry, while it relieves the owners from many of the perils of a maritime adventure, deprives them also of a great part of the profits of a successful voyage: and therefore, in the place of the owners' residence, where they may exercise their own judgment upon the propriety of borrowing money in this manner, the master of the ship is by the maritime law of all states precluded from doing it, so as to bind the interest of his owners, without their consent (o).

The meaning of the words "place of residence" (*la demeure des propriétaires*) has given occasion to some questions in *France*. With us I apprehend the whole of *England* is considered for this purpose as the residence of an *Englishman*; at least before the commencement of a voyage. *Ireland* has been held to be a foreign country, in the case of an *English* ship, hypothecated by the master there in the course of a voyage (p). But doubt may be entertained, whether the incorporation of *Ireland* with this country by the Act of Union, may not have the effect of altering the rule (q). The Court of Admiralty, not long ago, granted its warrant to arrest a ship on a bottomry bond executed at *Jersey* for the repairs and outfit, by a person who was both master and owner (r). In the bond this person was described as of *London*, and the ship as of *Jersey*. The authority of the Court to hold cognizance of the cause does not appear to have been disputed by the owner; and in the result the ship was sold under a decree of the Court (s). In a more recent case, wherein it appeared that a *Spanish* ship, on a voyage from *Alicant* to *London*, put into *Corunna* to repair, and that the master being unknown and without credit, gave a bottomry bond there for money advanced to defray the expenses: Lord *Stowell* decided that the bond was valid, and in the course of his judgment observed, "It was not in the same province of that distracted kingdom that the transaction took place, nor could the master, under the circumstances in which he was placed, have applied to his owners for assistance;

(o) Hanseatic Ordinance, art. 68; Hanseatic Ordinance of 1614, tit. 6, art. 1; French Ordinance, liv. 2, tit. 1; Du Capitaine, art. 17, and liv. 3, tit. 5; Des Contrats a grosse, art. 8; Emerigon, tom. 2, p. 424; Molloy, book 2, ch. 11, sect. 11; Weskett, tit. Bottomry, sect. 20, 23; *Lister v. Baxter*, 2 Stra. 695.

(p) In *Menetone v. Gibbons*, 3 Ter. Rep. K. B. 267, the hypothecation was made in *Ireland*.

(q) See the judgment in the *Rhadamanthe*, Mayer, 1 Dodson, A. R. 201.

(r) *The Barbara*, Chegwin, 4 Rob. A. R. 1.

(s) *Ibid.* 2.

and added, it is true that it is usually required as a condition necessary to the validity of bonds of this kind, that they should be executed in a foreign port, but the law does not look to the mere locality of the transaction. The validity or invalidity of the bond does not rest on that circumstance only, but upon the extreme difficulty of communication between the master and his owners. The difficulty of communication was, in fact, greater than if the ship had been in a foreign port. If the policy of the law in allowing this authority to the master to hypothecate his ship and cargo, is founded on the extreme difficulty of communication with his owners, there is no reason for saying that there was not abundance of difficulty to authorize him to do so in the present instance" (*t*).

With regard to a *foreign country*, the rule appears to be, that if the master of a vessel has occasion for money to repair or victual his ship, or for any other purpose necessary to enable him to complete the enterprise in which she is engaged, whether the occasion arises from any extraordinary peril or misfortune, or from the ordinary course of the adventure, he may, if he cannot otherwise obtain it, borrow money on bottomry at maritime interest, and pledge the ship, and the freight to be earned in the voyage, for repayment at the termination of the voyage. When this is done, the owners are never personally responsible (*u*). The remedy of the lender is against the *master* or the ship.

But if the person who thus advances money does not choose to take upon himself the risk of the ship's return, and will be content not to demand maritime interest, there seems to be no reason why the master should not pledge both the ship itself and the personal credit of the owner. And in a case, which came before Sir *John Strange*, Master of the Rolls, wherein a man, who had advanced money to refit a ship in distress at *Jamaica*, and had taken from the master both a deed of hypothecation of the ship, and bills of exchange upon the principal owner in *England*, for the amount of the sum advanced, claimed payment of the owners personally, the ship having been captured on the voyage home; it was decreed that he should recover the money; and it is said also, that the ship was thought to be well hypothecated (*v*).

(*t*) *La Ysabel*, Boyo, 1 *Dodson's Admiralty Reports*, 273.

(*u*) *Molloy*, book 2, ch. 11, sect. 11.

(*v*) *Samsun v. Bragington*, 1 *Ves.* 443.

It appears by the entry of the proceedings in the Registrar's book, that the defendant *Bragington* said in his answer, that he believed 20 per cent. was added to the

It is necessary, however, to the validity of a bond securing maritime interest, that the money should be originally advanced upon the 'credit of the ship. If it be originally advanced upon the credit of the owner, and such a bond be afterwards given, in consequence of doubt arising as to his responsibility, even before the ship leaves the place of advance, the bond will be invalid (*w*).

16. It is no objection to the validity of such a bond, that it happens to be given to the consignees of the cargo, by a master appointed by themselves; the necessity of such appointment, and of borrowing by hypothecation, and the fairness of the transaction, being established (*x*). § It has been doubted even whether a master substituted by underwriters, after abandonment by the owners, cannot give a valid bottomry bond (*y*). These securities are the creatures of necessity and distress, and may be expected to assume different shapes, which cannot be limited except by the condition of a faithful and beneficial discharge of the authority exercised in granting them, as being necessary for the preservation of property. A bottomry bond given to the charterer of the ship was supported by Lord *Stowell*, although there was a consignee of the ship at the port, the latter not being willing to make the advances (*z*). When a bottomry bond had been given to the agent (*a*) of the owner, and it was objected that the agent was bound to supply the necessary funds for the disbursements of the ship without bottomry security, the same learned judge said,—“The case of necessity, which is the foundation of a bottomry bond, does not arise where there is a credit existing, on which money can be obtained without resorting to the real security of the ship. At the same time, I will not take upon myself to lay it down as an universal proposition, that an agent may not, under any circumstances, take the security of a bottomry bond. Cases may possibly arise in which an agent may be justified in so doing. It can be no part of his duty to advance money without a fair expectation of being reimbursed; and if he finds it unsafe to

actual expense, to make up the sum for which the deed of hypothecation was given; but this does not seem to have been proved. The deed of hypothecation, as stated in the plaintiff's bill, was for payment absolutely, and not upon condition of the ship's safe arrival in England, and the deed was proved in the cause.

(*w*) The *Augusta*, D'Bluhn, 1 Dodson, A. R. 283.

(*x*) The *Alexander*, Tate, 1 Dods. A. R. 278; The *Rubicon*, 3 Hagg. A. R. 9.

(*y*) The *Kennerly Castle*, 3 Hagg. A. R. 1.

(*z*) The *Nelson*, 1 Hagg. A. R. 169.

(*a*) The *Hero*, 2 Dods. Rep. 139.

extend credit to his employers beyond a certain reasonable limit, he may then surely be at liberty to hold his hand, and to say, "I give up the character of agent;" and as any other merchant might, to lend his money upon bond, to secure its payment with maritime interest." §

Such a bond may be good in part and bad in part (*b*).

17. There is no settled form of contract in use on these occasions. Sometimes an instrument in the form of a bond, at others in the form of a bill of sale, at others of a different shape, is made use of (*c*). But, whatever the form, the occasion of borrowing, the sum, the premium, the ship, the voyage, the risks to be borne by the lender, and the subjection of the ship itself as security for the payment, all usually are and properly ought to be expressed.

§ It is absolutely necessary that the liability of the lender to the sea risks should appear or be fairly collected from the instrument, otherwise the reservation of maritime interest will render the security void, on the ground of usury, not only as a charge upon the ship, but also against the person of the borrower (*d*). And where an instrument called a bottomry bond contained an express clause that the sum secured should be paid within thirty days after intelligence of the loss, Lord *Stowell* doubted his jurisdiction to entertain the suit at all, and dismissed it, on the ground that the very essence of bottomry, which alone could give jurisdiction to the Admiralty, was wanting (*e*).

From this sentence an appeal was presented to the delegates, and that Court, after directing a search for precedents, decided that, as the maritime interest was reserved and maritime risk (*f*) excluded from the bond, it was void. But these instruments being the language of commercial men, and not of lawyers, will receive a liberal construction to give effect to the intention of the parties (*g*). Thus in an action on a policy of insurance, where the plaintiff in his declaration alleged his interest to be bottomry setting out the bond in which was the following clause: "I do

(*b*) *The Augusta*, D'Bluhn, 1 Dods. Adm. Rep. 283.

(*c*) The reader will find in the Appendix two different forms used in the same voyage, one at Bombay, the other at the Cape of Good Hope. In *Johnson v. Shippen*, 2 Lord Raym. 982, the hypothecation was by bill of sale; in *Mene-*

tone v. Gibbons, 3 Ter. Rep. 267, it was by bond.

(*d*) 2 Hagg. Adm. Rep. 57, *Atlas*, Clark.

(*e*) *Id.*

(*f*) 1 Hagg. Adm. Rep. 55.

(*g*) *Symmonds v. Hodgson*, 6 Bing. 114; 3 B. & Ad. 50.

further hereby bind myself and schooner brig *Clarence*, her freight and cargo of every kind, to the full and complete payment of said sum with all charges thereon, in eight days after my arrival at the aforementioned port of *London*, and I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of *London*, in preference to all other claims, until such sum with 12l. per cent. bottomry premium be paid" the Court of Common Pleas upon demurrer, decided that it was not bottomry, and gave judgment for defendant. The case being brought by writ of error before the Court of King's Bench, that judgment was reversed, and Lord *Tenterden* said, "We are all satisfied that our judgments must be for the plaintiffs; of course no person can be entitled to the *periculi pretium* who does not take upon himself the risk of the voyage—but it is not necessary that his doing so shall be declared expressly, and in terms, though this is often done: it is sufficient that the fact can be collected from the language of the instrument considered in all its parts. In this case, if the words—'instead of eight days after my arrival' had been 'eight days after my ship's arrival,' there could have been no doubt that the lender took upon himself the peril of the voyage, if there be not in some part of the instrument some matter denoting a contrary intention. Now the personal arrival of the master unconnected with the ship, is a matter which it cannot be supposed that either party contemplated, it cannot be supposed that the lenders looked to him personally or to his personal means,—nor that he intended to pledge himself personally and absolutely for the payment, without regard to the means with which he might be furnished by the ship and her freight; we, therefore, are of opinion that the words 'my arrival' must be understood to mean my arrival with the ship, or my ship's arrival; with respect to the words, 'I do hereby make liable the said vessel, her freight and cargo, whether she do or do not arrive at the above-mentioned port of *London*,' we think these words were intended to provide only for the ship's arrival in some other than the destined port, and in such an event, to give the lenders a claim on the ship in preference to other claims; it cannot be intended to provide for the case of the loss of the ship, because in that event there would be nothing on which a pledge could operate or a preference be claimed."

In the first form of a bottomry bond given in the Appendix to this work, it will be seen that the master and part-owner of the

ship binds not only himself and his ship, but also his co-owner personally, which unless authorized by such co-owner's deed previously executed he had no power to do. This indeed is frequently the form of the instrument, and though it be inoperative as to the owners personally, it is nevertheless valid as against the master and the ship. In the case of the *Nelson* (A), Lord Stowell said, "one objection is, that it binds the owners personally as well as the ship and freight—which it cannot do. Here we don't take this bond in toto, as is done in other systems of law, and reject it as unsound in the whole if vicious in any part. But we separate the parts, reject the vicious and respect the efficiency of those which are entitled to operate. The form of these bonds is different in different countries; so is their authority. In some countries they bind the owner or owners, in others not; and where they do not, though the form of the bond affects to bind the owners, that part is insignificant, but does not at all touch upon the efficiency of those parts which have an acknowledged operation." §

Bills of exchange drawn by the master on the owner, as security for money advanced to the master, though accompanied with a verbal engagement by him that the ship shall be liable, cannot be considered as an instrument of hypothecation (i). § But although a bottomry bond cannot be made to cover advances upon the personal security of the borrower, and not upon the exclusive security of the ship, yet if bottomry be originally contemplated the bond will not be invalidated by taking bills of exchange at the same time by way of collateral security (k). §

18. It is equally clear that the master cannot charge the ship by any instrument of hypothecation for any debt of his own. The attempt would be a fraud in him; and those who should aid him to do so would be parties to the fraud, and therefore the fairness of the loan may be made the subject of inquiry and contest, if justice require it. But provided the ship have been in a state of want, and the money fairly advanced to the master to relieve her, his subsequent misapplication of it will not deprive the lender of the benefit of his security (l).

(A) 1 Hagg. Adm. Rep. 176. See and 229.

also 1 Hagg. 13; 3 Robt. Adm. Rep.; 1 Dods. Adm. Rep. 288; 2 Dods. 146.

(i) 3 Ves. & Beames, 135; 19 Vesey, jun. 474; ex parte Halket, 2 Rose, 194

(k) The *Augusta*, 1 Dods. A. R. 283; The *Jane*, ibid. 461.

(l) Dig. 14, l. 7, 2, Molloy, book 2, ch. 11, s. 11. See also the judgment of

§ Although it may be questionable whether a lender on bottomry be bound to see to the application of the money he advances, it is clear he must make due inquiry to ascertain that an unprovided necessity exists, and that without money so advanced the ship cannot proceed on her voyage. Accordingly where, without such previous inquiries, advances were made on bottomry to the master of a ship, which had arrived with a considerable cargo in a foreign port, and remained there two months, the repairs, which were unimportant, having been completed, and her stores furnished before the advance, although there was no fraud on the part of the bondholder, yet as there was no real necessity for borrowing on maritime interest, the bond was not supported (*n*).§

As an illustration of the rule, that the master cannot bind the ship for a debt of his own, the following case is related by *Loccenius* (*o*). The master of a ship being in a *Spanish* port, and having exposed the ship to seizure by his neglect to comply with a particular regulation of the country, entered into an agreement with a person who was supposed to possess sufficient influence to obtain the restitution of the ship, to pay him a very considerable sum with maritime interest, if he should procure the restitution of the ship, and she should afterwards return home in safety; and for securing the payment executed an instrument in the nature of a bottomry bond. By the interest of the person with whom the agreement was made, the ship was restored, and afterwards returned home in safety; and he instituted a suit against the ship upon the instrument executed to him by the master. But it was determined that the ship and owners were not chargeable by this contract.

§ The bond must be given by the master acting as such within the scope of his authority. A ship was freighted and insured from *London* to *Calcutta* and back. The master, on his arrival there, employed certain merchants, upon whom he had a limited credit, to procure a return cargo. This credit was, however, soon exceeded, and on their advice he took a cargo to the *Mauritius*. In defiance of letters from his owners, ordering him to return home, he afterwards made several intermediate voyages,

Sir W. Scott, in the case of the *Gratitude*, *Maxsola*, 3 Rob. A. R. 272.

(*n*) The *Orelia*, 3 Hagg. A. R. 75.

(*o*) Lib. 2, c. 6, s. 12.

and having returned to *Calcutta*, chartered his vessel to the same merchants, who on a fresh cargo to the *Mauritius*, received the freight, and for a small balance in their favour, took from him a bottomry bond. The Court of Admiralty pronounced against the bond. The advances thus made by the merchants beyond the credit limited by the owners were held to have been made on the credit and responsibility of the master. If any necessity existed for a loan on bottomry, it had been created by the merchants themselves, who had no right to trust to his representations, or aid his private schemes and speculations, without authority from his owners (*p*). §

19. Upon the arrival of the ship in this country, if the loan is not repaid within the time prescribed, the agent of the lender applies to the Court of Admiralty, with the instrument of contract, and a proper affidavit of the facts, and obtains a warrant to arrest the ship, and cite all persons interested to appear before the Court, if they think proper to do so (*q*). If in the course of the proceedings it becomes necessary to sell the ship, the Court decrees a sale to be made under the direction of its own commissioners, and afterwards distributes the proceeds among the different claimants, as justice requires; and this may be done, if the owners or persons interested in the ship do not appear at the times appointed by the Court; otherwise their absence or default would occasion a failure of justice.

This proceeding *in rem.* against the ship itself, is the proper and peculiar province of the Court of Admiralty. The jurisdiction of the Courts of Common Law is exercised by suit against the person only (except in some particular cases of forfeiture, or demands of the Crown) although in many cases judgment is ultimately pronounced for the recovery of the subject of dispute in specie.

(*p*) *The Reliance*, 3 Hagg. A. R. 66. In the case of the *Aurora*, the doctrine was summed up in the Supreme Court of the United States in the following terms:—"To make a bottomry bond, executed by the master, a valid hypothecation, it is necessary to show, that the master acted within the scope of his authority, or in other words, that the advances were made for repairs or supplies necessary for effec-

tuating the objects of the voyage, or the safety and security of the ship. And no presumption should arise in the case that such repairs or supplies could be procured on reasonable terms with the credit of the owner, independent of such hypothecation."—1 Wheaton's Rep. 96.

(*q*) The citation is generally made by posting a copy of the warrant upon some part of the ship.

The legality of the proceedings in the Court of Admiralty, in case of such hypothecation by the master in a *foreign country*, which are calculated to administer justice in a manner that cannot be effected by the Courts at Westminster Hall, has been recognised by those Courts in a variety of cases, and is now so fully established that it appears unnecessary to mention their particular circumstances, and I shall therefore merely refer to them in a note (r), in order to enable the learned reader to consult them with facility, if he has occasion to do so.

20. It should be observed of these securities in general, that if they are given at different periods of a voyage, and the value of the ship is insufficient to discharge them all, the last in point of date is entitled to priority of payment, because the last loan furnished the means of preserving the ship, and without it the former lenders would entirely have lost their security; *salvam fecit totius pignoris causam* (s).

This is the general rule, but the security last in date must have arisen out of the destitute situation of the master, and his inability to obtain the necessary supplies for his vessel, on the personal credit of himself or his employers. Otherwise it will not be a security of that privileged kind, which is entitled to claim precedence and defeat the right of a foreign merchant, who has previously advanced money on the ship. This was the decision in a case in the Court of Admiralty, of which the following were the facts. The vessel was bound on a voyage from *Malta* to *London*, and put into *Port Mahon* in distress, where the master hypothecated the ship and freight. The ship being repaired, proceeded on her voyage, and in consequence of damage put into *Cork*, from whence the master applied by letter to the principal owners of the cargo for money to pay for the necessary repairs, who, in consequence of this application, opened a credit with Messrs. *Goin &*

(r) *Bridgman's Case*, 12 Jas. 1; Hob. 11; Moor. 918; 1 Ro. Ab. 530; *Scarborough v. Lyrus*, 3 Car. 1; Latch. 252; Noy, 95; *Copset v. Husely*, 1 W. & M. Comb. 135; Rep. temp. Holt, 48; *Benzen v. Jefferies*, 8 & 9 Wm. 3, 1 Lord Raym. 152; *Johnson v. Shippen*, 2 Ann. 2 Lord Raym. 982; Salk. 35; 6 Mod.

79; Rep. temp. Holt, 48; *Lister v. Baxter*, 12 Geo. 1, Stra. 695; *Menetone v. Gibbons*, 29 Geo. 3; 3 Ter. Rep. K. B. 267.

(s) *Bynkershoek*, Quest. Jur. Pub. lib. 1, c. 19. See the *Eliza*, Weddell, 3 Hagg. A. R. 87.

Fennel, of *Cork*, and gave them directions to advance such money to the master as should be requisite to repair the ship. Messrs. *Goin & Fennel* advanced the money, and took bonds of bottomry, which they indorsed over to the principal owners of the cargo, and drew on them bills of exchange for the amount of the money so advanced to the master. The Court pronounced for the validity and priority of the first bottomry bond granted at *Port Mahon* (t).

21. The value of the ship and freight, supposing the ship to reach the place of destination, may sometimes be thought an insufficient security for the amount of the expenses of the repairs, &c. necessary to put the ship into a condition to proceed with its cargo and perform the voyage. In such a case of necessity it has been always held, that the master, if he cannot otherwise obtain money, may sell a part of his cargo to enable him to convey the residue to the destined port (u); and it has been very solemnly decided in the Court of Admiralty, that the master may hypothecate the cargo as well as the ship and freight (v). An *Imperial* ship coming from the *Mediterranean* with a cargo of fruit to *London*, was driven into *Lisbon* to refit. An estimate and survey were made under the authority of a Court at *Lisbon*, and it was declared by the surveyors, that the ship was of sufficient value to warrant the repairs. The sum for which the deed of hypothecation was executed exceeded the estimate of the ship in its damaged condition, and of the freight, by a sum which was supposed to be about equal to the charge that would fall upon the cargo for unloading, warehousing, &c. The ship arrived at *London*, and the loan not being discharged, the creditor instituted a suit in the Court of Admiralty against the ship and cargo. The ship produced considerably less than its estimated value, on account of its being a foreign ship, and the impossibility of obtaining a register for it. It was admitted that the question, as to the validity of the hypothecation of the cargo had never been actually contested and decided in this country; but several precedents of proceedings in the Court upon similar cases were found among the records of the Court, and it

(t) *Rhadamanthe*, Mayer, 1 Dodson, A. R. 201.

(u) So where money is necessary to discharge the salvage on a recapture: by Lord Ellenborough, Ch. J., in *Parmenter*

v. *Todhunter*, 1 Camp. 541,

(v) *The Gratitude*, Mazzola, 3 Rob. A. R. 240. The instrument of hypothecation used on this occasion will be found in the Appendix to this Treatise, No. IV.

was agreed, that the practice of hypothecating the cargo in such cases was frequent among merchants. It did not appear whether or no the master had an opportunity of sending the cargo by another ship; but the learned Judge of the Court held, that according to all the authorities on the subject of transhipment, the master was not *bound* to tranship; and thinking, upon the view of all the circumstances of the case, that the master had acted for the best, according to the appearance of things at the time, decided that the hypothecation of the cargo was valid, considering the hypothecation of *the whole* to be both in its principle, and in the consequences, that might ordinarily result from it, exactly analagous to the sale of *a part*. On account of the great importance of the question, the learned Judge invited the parties to bring it by appeal before another tribunal.

22. It has been observed, that wherever the master may pledge the ship, he may pledge the freight also. A question upon the extent of such a pledge has been decided in the Court of Admiralty (*w*). The master of a *Hamburgh* ship, being at *Baltimore*, and about to sail for *Cork*, executed a bottomry bond, purporting to bind the ship and her freight, in general terms, neither expressly confined to the freight of the present voyage, nor extended to future adventures. The ship sailed to *Dublin* instead of *Cork*, and thereby the holder of the bond lost the opportunity of instituting proceedings upon it at that time, and the freight was accounted for to the owners, though the deviation did not appear to have been made with this view. From *Dublin* the ship sailed again to *America*, and from thence to *London*, at which latter place the holder procured the ship to be sold under the authority of the Court of Admiralty; and the produce being insufficient to discharge the bond, he petitioned the Court to have the freight of the last voyage applied to that purpose. The freight was then in the hands of the agent of the owners; it was objected, that such a bond created a lien upon the freight of the existing voyage only, but the learned Judge of the Court, advertng to the fact of the freight of both voyages having come to the account of the owners, granted the prayer of the petition; at the same time, desiring "not to be understood as laying down any general rule

(w) *The Jacob, Bear*, 4 Rob. A. R. 245.

applicable to all circumstances and all cases, where any third party might have become interested in the freight* of the subsequent voyage." It has been held also in that Court, that freight earned from sub-shippers of goods, by permission of the charterers of the whole ship, is liable as against them in payment of a bottomry bond, given at the port of the charterers, for advances subsequent to the charter-party (x).

(x) *The Eliza*, Weddell, 3 Hag. Ad. Rep. 87.

CHAPTER IV.

OF THE BEHAVIOUR OF THE MASTER AND MARINERS.

1. The great trust reposed in the master by the owners, and the great authority which the law has vested in him, require on his part, and for his own sake, no less than for the interest of his employers, the utmost fidelity and attention. For if any injury or loss happen to the ship or cargo by reason of his negligence or misconduct, he is personally responsible for it; and although the merchant may elect to sue the owners, *they* will have a remedy against him to make good the damages, which they may be compelled to pay. So, if he make any particular engagement or warranty without a sufficient authority from his owners, although the owners may be answerable to the persons with whom he contracts, by reason of the general power belonging to his situation and character, he is in like manner responsible to the owners for the injury sustained by them in consequence of his acting beyond, or in violation of, the particular authority given to him (a).

2. He is bound also to employ his whole time and attention in the service of his employers, and the performance of the duties of his particular character, and is not at liberty to enter into any engagement for his own benefit, that may occupy any portion of his time in other concerns; and therefore, if he do so, and the price of such engagement happen to be paid into the hands of his owners, they may retain the money, and he cannot recover it from them. This is well illustrated by the following case:—The master of an *English* ship, being at *Smyrna*, entered into an agreement with the deputy commissary of an *English* army

(a) Fletcher v. Braddick, 2 New Rep. 182; Fenton v. Dublin Steam Packet

Company, 1 P. & D. 103, ante, p. 44, and post, "Collision."

to let the ship to Government for six months ; and having stipulated that his owner should receive forty shillings per ton per month, he required that he himself should be allowed the usual primage ; the commissary refused to make any allowance by way of primage, the freight being so very high ; but as he expected great assistance from the master's skill and activity in managing the transport service in that quarter, he agreed, that instead of primage the master should be allowed one shilling per ton per month on the ship's tonnage. The ship remained in the *Mediterranean* under this contract for about nine months. The master might have obtained a cargo of merchandize at *Smyrna*, upon which he would be entitled to a primage of five per cent. on the freight. During the period of this engagement his personal exertions were of considerable benefit to the public service. The whole of the money was paid by Government into the hands of the owner, and the master brought an action against him to recover this allowance. The cause was tried before Lord *Ellenborough*, who said, " It is contended that a servant who has engaged to devote the whole of his time and attention to my concern, may hire out his services, or a part of them, to another ? It would have been a different thing, if the owner had been suing for his money ; but I am clearly of opinion, that at all events the present plaintiff has no right to it. Under this contract he must have been taken from superintending the defendant's ship ; and I don't know how far it might go, if such earnings could be recovered in a court of justice. No man should be allowed to have an interest against his duty. I will assume that the plaintiff obtained as high a freight as possible for his owners, and that his services to Government were meritorious ; still there would be no security in any department of life or business, if servants could legally let themselves out in whole or in part. My opinion upon the subject is quite decisive ; and if it be doubted, I beg that a bill of exceptions may be tendered" (b). No lawyer will doubt the correctness of this opinion. It was fit that the reader should be informed of it in the very forcible terms in which it was expressed.

Upon principles analogous to those which governed the decision in the case of *Thompson v. Havilock*, it was ruled by Lord *Ellen-*

(b) *Thompson v. Havilock*, 1 Camp. 527. Upon the recommendation of the Chief Justice, the owner consented to

make the master some allowance in the nature of primage. But he could not have insisted upon this.

borough, that a premium received by the master of a ship from the state of the exchange, in respect of a bill drawn by him upon his owners on the ship's account, belonged to the owners; although it was suggested, that in practice the master was allowed to retain a profit of this kind for his own use (c).

3. There is one very important branch of the master's duty in time of war, which he should be most careful to observe; I allude to his conduct when sailing under convoy; for besides the civil responsibility that he may incur to his owners or freighters, by misbehaviour in this respect, it may be expected that in any future war, statutes may be again enacted, similar to those which were passed during the late war, whereby he may be subjected to fine or imprisonment. And it is at all times his duty to communicate to his owners any occurrence which may lead to a suspicion or doubt, that his ship has sustained a damage, lest his owners should lose the benefit of an insurance which they may effect, and he thereby become answerable to them (d).

4. It is impossible to frame any set of general rules competent to enforce the performance of all the civil obligations of a person of this description, and the legislature of this country has with some exceptions very prudently declined the attempt. With respect, however, to the mariners, whose duty is much more simple, a few important rules (e) were introduced in the reign of George II. which were at first confined to ships sailing from this country to parts beyond the seas; and afterwards extended to the *British Colonies in America* (f). Similar provisions were also made with respect to vessels of the burthen of one hundred tons and upwards employed in the coasting trade, and going to open sea (g). § But these acts, as well as several others relating to the same subject, were repealed (h) in the reign of his late Majesty (1835), and an act (i) was passed "To amend and consolidate the laws relating to the Merchant Seamen of the United Kingdom, and for forming a register of all the men engaged in that service," which act is now the law upon this important subject. This statute, after a preamble, reciting "that the prosperity, strength, and

(c) *Diplock and others v. Blackburn*, 3 Camp. 43.

(d) *Gladstone v. King*, 1 M. & S. 35.

(e) 2 Geo. 2, c. 36.

(f) 2 Geo. 3, c. 31.

(g) 31 Geo. 3, c. 39.

(h) 2 & 3 Anne, c. 6; 2 Geo. 2, c. 36; 2 Geo. 3, c. 31; 31 Geo. 3, c. 39; 45 Geo. 3, c. 81; 37 Geo. 3, c. 73; 58 Geo. 3, c. 38; 4 Geo. 4, c. 25; 3 & 4 Wm. 4, c. 88; 59 Geo. 3, c. 58.

(i) 5 & 6 Wm. 4, c. 19.

safety of this United Kingdom, and of his Majesty's dominions, do principally depend on a large, constant, and ready supply of seamen, as well for the commerce as for the defence thereof, and that it is necessary to aid, by all practicable means, the increase of the number of seamen, and to give them all due encouragement and protection," proceeds to establish several important and most beneficial regulations respecting the contracts of mariners with their employers, their treatment and remuneration, which will be noticed in subsequent chapters, to which, according to the arrangement adopted by the author, they appropriately belong.

A very slight comparison of the provisions of this statute with those of the repealed acts, will convince the reader of the great alteration which has taken place in the temper of *British* Legislation, in favour of merchant seamen. The chief object of the earlier acts of Parliament, would appear to have been the promotion of "the welfare and riches of the Kingdom," by "the encouragement of trade and navigation;" comparatively little solicitude was evinced to protect the rights or provide for the health and proper treatment of the mariners. The agreement between them and their employers was required, as it now is, to be in writing; but no precise form was prescribed for the protection of a class of men for the most part improvident and illiterate; and, indeed, if good faith could always have been relied upon in the other contracting parties, perhaps the simplest form, so long as it specified the voyage contracted for and the rate of the wages to be paid, was the best (*l*). Experience, however, proved that advantage was too often taken of the humble attainments and capacities of seamen, to introduce special engagements into the agreement, sometimes rendering them liable to the penalties contained in Acts of Parliament (*m*), with which they could not be conversant, often contrary to all natural justice and the known principles of the maritime law; and although the Court of Admiralty insisted, as a Court of Equity, on its right to examine

(*l*) See the observations of Lord Stowell in the case of the *Minerva*, Bell, 1 Hag. 347.

(*m*) In the year 1797, an act was passed, 37 Geo. 3, c. 73, for preventing the desertion of seamen from merchant vessels trading to the West Indies; imposing very severe penalties on temporary

absence from duty, desertion, and other misconduct. It appears from the judgment of Lord Stowell, in the case of the *Minerva*, 1 Hag. Ad. Rep. 356, that the provisions of this statute had been embodied into a printed form, which seamen, unable to read or write, were compelled to execute.

whether such stipulations were reasonable, and, as such, binding on the mariners, yet, in the Courts of *Westminster Hall*, the rules of construction applicable to all other contracts between private parties were applied to these.

Throughout the 5 and 6 Wm. IV. c. 19, a careful anxiety is evinced to guard the interests of the seaman. He is not liable to be betrayed into executing articles, with the purport of which he is unacquainted. A form embodying every engagement into which he ought to be required to enter, is prescribed by the statute; and any agreement contrary to, or inconsistent with, its provisions, and with the right to wages given to him by the maritime law in case of freight earned by ships subsequently lost, is declared not to be binding upon him (*n*).

It is expressly provided that he shall not, by signing the agreement, forfeit his lien upon the ship, or be deprived of any remedy for the recovery of wages which seamen were before lawfully entitled to against the ship, the master, or the owners; and he is informed, in a note to the articles, that any embezzlement, wilful or negligent loss or destruction of any part of the ship's cargo or stores, may, as the maritime law allows (*o*), be made good to the owner out of the wages, so far as they will extend, of the seamen guilty of the same; and that, if any seaman shall enter himself as qualified for a duty to which he shall prove to be not competent, he will be subject to a reduction of the wages agreed for in proportion to his incompetency (*p*).

5. By the terms of the agreement prescribed by this Act of Parliament, the seaman undertakes to serve on board the ship during the voyage described in it, and to conduct himself in an orderly, faithful, and honest manner, to be at all times diligent in his duty and station, and obedient to the lawful commands of the master; an engagement which seems to comprise all the general duties of a mariner to his employers. The breach of these duties and of this engagement, consists in desertion, quarrelsomeness, turbulence, mutiny, disobedience, neglect of duty, drunkenness; offences which, according to the frequency of their occurrence, the length of their continuance, and the circumstances of each particular case, besides the penalties and forfeitures enacted by the statute,

(*n*) Sect. 5.

(*o*) Molloy, B. 2, c. 3, s. 9; 1 Lord Raym. 650.

(*p*) See the form of the articles in the schedule to the act.

may at common law justify the personal restraint and correction of the mariner, or subject him to dismissal and forfeiture of wages. It may happen, that the regulations prescribed by the statute to protect the mariner against an undue infliction of forfeitures, such as the entry in the log-book of the circumstances attending the alleged offence, have not been complied with by the master; and in such a case, although the statutory forfeitures may not be incurred, yet proof of the mariner's misconduct, to the satisfaction of the Court of Admiralty, may furnish a defence to an action brought by him for his wages against the master or owners.

With respect to the breach by the mariners of their contract, to serve on the voyage described in the articles, by refusing to embark, neglect of duty, temporary absence from the ship, and desertion,—if the seaman refuse to proceed on the voyage for which he has bound himself to serve, or absent himself without leave, he may, in any part of his Majesty's dominions, at home or abroad, be taken before a justice of the peace, and be committed to hard labour in the house of correction, or he may, at the request of the master, and with his own consent, be taken on board the ship, or delivered to the master, for the purpose of proceeding on the voyage (*q*).

The voyage once commenced, it is his duty not only to navigate the ship in favourable weather, but to protect her in adverse weather through all perils; and even in shipwreck, to exert himself to save as much of her and her cargo as he can. However courageously or efficiently this duty may have been performed, or however great the danger he may have incurred, he is entitled to no extraordinary remuneration. He has only discharged his covenanted allegiance to the vessel, which he contemplated and pledged himself to give in the very formation of the contract which gave him his title to the stipulated wages. The ship, on the other hand, is pledged to him. Even when she has gone to pieces, he is not at liberty to depart from the shore where the mischance has been encountered: "He has a right to cling to the last plank, in satisfaction of his wages" (*r*), and is bound to stand

(*q*) 5 & 6 Wm. 4, c. 19, s. 6.

(*r*) *The Sydney Cove*, 2 Dods. Ad. Rep. 13; *the Neptune*, 1 Hag. Ad. Rep. 227; *Lady Durham*, 3 Hag. Ad. Rep. 196.

It would seem, from these decisions, that the case of shipwreck is an exception to the rule that freight is the mother of wages. In the American Courts, the lien

by and obey the master so long as there remains, in his judgment, a prospect of recovering any part of the ship or of the cargo.

In case of a contract for a voyage out and home, or to touch at several ports, the mariners are bound to take care of the vessel, and assist in the stowage and delivery of the cargo^(r) at the several ports to which the voyage as described in the articles extends. When arrived at the port of final destination, the voyage, within the meaning of the contract, is not concluded by the mere fact of arrival. The act of mooring is an act to be done by the crew. There is no period at which the cargo is more exposed to hazard than when it is in the act of being transferred from the ship to the shore; and the maritime law accounts as a desertion the departure of the mariners from the vessel, until the cargo be actually delivered^(s).

If the master propose to take the vessel on a voyage not designated by the articles, the mariners may leave the ship, without being guilty of desertion^(t); and words of indefinite meaning inserted in the ship's articles, as "and elsewhere," will be construed in favour of the mariners, and with reference to the general course and routine of the voyage described in the context^(u). "Such words," said Lord *Stowell*, "must receive a reasonable construction, conformable to the necessities of commerce; they are not to be taken in the indefinite latitude in which they are expressed. They are no description of a voyage; they are an unlimited description of the navigable globe, and are not to be admitted as a universal *alibi* for the whole world, including the most remote and even pestilential shores" ^(v). "Want of provisions will justify the seaman in leaving the ship. He must be found with food so long as he remains on board and is willing to do his duty; and if it be not supplied, he is at liberty to seek it elsewhere. "The men," said Lord *Stowell*, in the case of the *Castilia* ^(w),

of seamen on property saved from shipwreck for their wages, is put upon the ground of a qualified salvage. See Mr. Justice Storey's note to the American edition, p. 452. See, as to the practice in England, Weskelt. Insur. tit. Wages, art. 17.

^(r) The Cambridge, 2 Hag. Ad. Rep. 243.

^(s) The Baltic Merchant, Edw. Ad. Rep. 86.

^(t) The Countess of Harcourt, 1 Hag. 248; the Cambridge, 2 Hag. 243.

^(u) The Eliza, 1 Hag. 182; the Minerva, 1 Hag. 347.

^(v) The Minerva, 1 Hag.

^(w) 1 Hag. 59. See also the Eliz. 1 Hag. 182.

“had no breakfast, and there was the same prospect as to dinner. Their departure was therefore justified.”

Misconduct and ill treatment on the part of the master may also justify desertion. The duties of the mariners and the master are reciprocal : from the former are due obedience and respect, from the latter, protection and good treatment. “Desertion,” said Lord *Kenyon*, “is a forfeiture of wages ; but if the captain conducts himself in such a way as puts the sailor into that situation, that he cannot, without damage to his personal safety, continue in his service ; human nature speaks the language ; a servant is justified in providing for that safety (*x*). The Courts of Admiralty and of Common Law, will consider with indulgence to the seaman all the circumstances of each case, what his intention was at the time, and what excuse he may have for the absence which is alleged as desertion. Thus, where two seamen having obtained leave to go on shore at *Dominica*, on condition that they returned at ‘gun-fire or sun-set in the evening,’ went to a place of entertainment, got very drunk, slept all the night under the table, never heard the gun fire, were drunk all the next day and night, and were then taken before a magistrate and charged with desertion,” Lord *Stowell* said (*y*), “This conduct of theirs was criminal, and as such a just subject of punishment ; but as to the crime of desertion, it no more resembles that, than it does a robbery or a murder. They had left all their clothes on board, and made no preparations, and their conduct on shore was the very reverse of what must have been the conduct of men meditating an escape.” An action by a seaman for his wages was defended on the ground of desertion. It appeared that the plaintiff with other seamen had come on shore in a boat with some officers, and on being required to return to the ship, they said they had had no victuals the whole day, and requested to stay till they had some. This being refused they remained on shore, and went to the ship the next morning, when the master dismissed them, and refused to pay their wages.” Lord *Eldon* (*z*) said, “The question here is, is this a desertion? I am of opinion that it is not ; the plaintiff and the other seamen only requested to be permitted to remain on shore to have some victuals ; it was a reasonable request ; they had no intention of

(*x*) *Limland v. Stephens*, 3 Esp. Rep. 269.

(*z*) *Segard v. Roberts*, 3 Esp. Rep. 71.

(*y*) *The Ealing Grove*, 2 Hag. 15.

abandoning the ship, they in fact went on board as soon as they had the means, and were refused to be received. After thus offering to return to their duty, the captain shall not be permitted to call such conduct a desertion, when the whole conduct of the plaintiff showed that no such act was intended." Again, in the case of the *Frederick* (a) a suit for seaman's wages, the owners put in a defensive allegation that the plaintiff, with five other mariners, got intoxicated with rum clandestinely procured, that they quarrelled with the steward and the mate for not giving them more, and made the same demand on the captain in a violent and turbulent manner. Being desired to go to bed and put out the lights, they refused to obey, and the captain told the ringleader that if he was dissatisfied he might go on shore, which he said he would do. The others then said, if one went all would go, and the captain ordered the second mate to go in the boat with them. It was alleged that he did not in any way discharge them, and that they were guilty of mutiny and desertion. But Lord *Stowell*, in commenting on the evidence said, "I am bound to notice that the captain admits he was so irritated, that he cannot depend exactly upon his memory of what passed; that the principal mate, a witness of great credit, goes no further than to say, that the captain did not *formally* discharge them; leading, by the use of this word *formally*, to a conjecture that there might still be something said, which these men with a willingness of interpretation on their side might construe into an actual liberty to depart, a *liceat migrare*. And if his words were such as might be so misunderstood, it would be a little hard, I think, to stamp that misinterpretation with the guilt of absolute mutiny and desertion." But an absence originally permissive may become a desertion, if the mariner, when required to do so, refused to return to the ship (b). And on the other hand a clear case of desertion may be mitigated into the less offence of temporary absence, if at the time not treated by the master as a desertion, or by his subsequent condonation" (c).

With respect to the other offences before mentioned, the reader may be referred to the judgment of the Court of Admiralty in the case of *Robinett v. the ship Exeter* (d), which was a suit for wages brought by the mate, who had been hired by the captain at

(a) 1 Hag. 211.

(b) *The Bulmer*, 1 Hag. 163.

(c) 5 & 6 Wm. 4, c. 10, s. 7; *Miller*

r. *Brant*, 2 Camp. 590; *Beale v. Thompson*, 4 East, 546.

(d) 2 Rob. Ad. Rep. 261.

Bombay, and discharged in the course of the ship's voyage to *Europe* at *Colombo*, on a charge of incapacity, drunkenness, neglect, and disobedience of orders. "Upon the matter of drunkenness," said Lord *Stowell*, "the Court will be no apologist for that, it is an offence peculiarly noxious on board a ship where the sober and vigilant attention of every man, and particularly of officers, is required. At the same time, the Court cannot entirely forget that in a mode of life peculiarly exposed to severe peril and exertion, and therefore admitting in seasons of repose something of indulgence and refreshment, that indulgence and refreshment is naturally enough sought by such persons in grosser pleasures of that kind, and therefore that the proof of a single act of intemperance committed in port, is no conclusive proof of disability for general maritime employment. Another rule would, I fear, disable many very useful men for the maritime service of their country.

"As to disobedience to lawful command, it is an offence of the grossest kind, the Court would be particularly attentive to preserve that subordination and discipline on board of ship which is so indispensably necessary for the preservation of the whole service, and of every person concerned in it. It would not, therefore, be a peremptory or harsh tone, or an overcharged manner, in the exercise of authority, that will be ever held by this Court to justify resistance. It will not be sufficient that there has been a want of that personal attention and civility which usually takes place on other occasions, and might be wished generally to attend the exercise of authority. The nature of the service requires that those persons who engage in it should accommodate themselves to the circumstances attending it, and those circumstances are not unfrequently urgent and create strong sensations which naturally find their way in strong expressions and violent demeanor. The persons subject to this species of authority are not to be captious, or to take exception to a neglect of formal ceremonious observances of behaviour, and on these grounds, the Court would hold that the charges of this defence are of a nature sufficient to justify dismissal if they are properly substantiated in evidence, although it might at the same time be proved that less personal civility had been used than would excuse something of an hesitation of obedience in other modes of life." §

6. By the common law, the master has authority over all the mariners on board the ship, and it is their duty to obey his commands in all lawful matters relating to the navigation of the ship,

and the preservation of good order: and such obedience they expressly promise to yield to him by the agreement usually made for their service (*d*). In case of disobedience or disorderly conduct, he may lawfully correct them in a reasonable manner; his authority in this respect being analogous to that of a parent over his child, or of a master over his apprentice or scholar (*e*). Such an authority is absolutely necessary to the safety of the ship, and of the lives of the persons on board. But it behoves the master to be very careful in the exercise of it, and not to make his parental power a pretext for cruelty and oppression. The framers of the ancient marine ordinances appear studiously to have avoided the mention of this power. The *French* ordinance (*f*) specifies certain particular modes of punishment, which the master may inflict on "drunken and disobedient mariners, and those who ill-treat their comrades, or commit other like faults in the course of their voyage," but it requires the consent of the steersman and mate. By the law of *England*, such consent is not required; nevertheless the master should, except in cases requiring his immediate interposition, take the advice of the persons next below him in authority, as well to prevent the operation of passion in his own breast, as to secure witnesses to the propriety of his conduct. For the master, on his return to this country, may be called upon by action at law, to answer to a mariner, who has been beaten or imprisoned by him, or by his order, in the course of a voyage; and for the justification of his conduct, he should be able to show, not only that there was a sufficient cause for chastisement, but also that the chastisement itself was reasonable and moderate, otherwise the mariner may recover damages proportionate to the injury received (*g*).

(*d*) See Appendix, No. V.

(*e*) *Magister nullam habet jurisdictionem ingentum suarum navium, sed quandam tantum œconomicam potestatem vel disciplinam, quæ usque ad levem castigationem, pro corrigendâ insolentia et male moratâ vitâ seu licentiâ nautarum et vectorum; quemadmodum eam tenet pater in filios, magister in discipulos, dominus in servos vel familiares.* Casaregis, Disc. 136, n. 14, cited by Valin on French Ordinance, tom. 1, p. 449. See also Ordinance of Phil. 2, A.D. 1563;

2 Mag. 19; Molloy, book 2, ch. 3, sect. 12, and the case of *Watson v. Christie*, 2 Bos. & Pull. 224.

(*f*) Liv. 2, tit. 1, Du Capitaine, art. 22.

(*g*) To an action of this sort, the master must plead specially that the plaintiff committed such a particular fault, and that he corrected him moderately for it. The plaintiff by his replication may either deny the cause of correction, or, admitting the cause, may insist that the correction was excessive. If the master does not plead his justification specially, he will

§ In the Court of Admiralty, also, a mariner may obtain redress for an undue exercise of authority on the part of the master, by the infliction of undeserved or excessive correction (*h*). This jurisdiction is familiarly exercised by that court in what are called causes of damage, the judge determining, in consideration of all the circumstances of the case, the plaintiff's right to maintain the action, and the amount of compensation he is entitled to receive. In estimating the defence of the master to such a suit, the court will give little weight to charges of misconduct of a different character from that which was the immediate occasion of the punishment complained of; but it will not confine its attention to the circumstances of recent offence, where the master can justify himself by proof of similar and habitual misbehaviour (*i*).

With respect to the manner of the punishment which may lawfully be inflicted by the master, the judgment of Lord *Stowell*, in the case of the *Agincourt*, above cited, deserves to be inserted here. "It is hardly to be disputed," says his Lordship, "that in a case of gross misbehaviour, the master of a merchant ship has a right to inflict corporal punishment upon the delinquent mariner. That right must be supported by the law of *England*, which is the proper authority for fixing the limits within which one subject of this realm has a right to inflict corporal suffering upon another. Upon that ground I dismiss all reference to authorities of foreign maritime law, and I regret that so little upon this subject is to be found in our own. No statutable regulations exist upon this subject. The statute relating to merchant seamen is silent upon it (*j*); the only authorities are supplied by the decisions of the courts of law, acting upon considerations of necessity and just discretion; and upon such grounds, I think the following rules may be considered as sufficiently established. In the first place, that the punishment must be applied with due moderation. It is asserted in some well considered books, that the law gives the same authority to the captain of a merchant ship to chastise his mariners for misbehaviour, as a master possesses over his apprentices; mean-

not be entitled to give in evidence under the general issue, for the purpose of mitigating damages, facts, which, if pleaded, would amount to a justification. *Watson v. Christie*, 2 Bos. & Pull. 224.

(*h*) *The Ruckers*, 4 Robs. Rep. 73;

the *Agincourt*, 1 Hag. 271; *Lowther Castle*, 1 Hag. 384; the *Enchantress*, 1 Hag. 395; the *Centurion*, 1 Hag. 161.

(*i*) See the cases of the *Agincourt* and the *Lowther Castle*.

(*j*) 2 Geo. 2, c. 36.

ing that it is inherent in him, upon the same grounds of necessity and sound discretion in the one case as in the other; not, certainly, to be used exactly in the way of an equal measure of punishment, because the apprentice is generally a youth of comparatively tender years, and whose acts of misbehaviour can hardly produce the same destructive consequences as may attend the negligence of the mariner, an experienced person, of confirmed strength, capable of sustaining a severer infliction than could properly be inflicted on a stripling, and whose acts, even of negligence, may draw after them consequences fatal to all the lives and all the the property on board. It is hardly necessary to add as a corollary, that in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and therefore, that the party charged should have the benefit of that rule of universal justice, and of being heard in his own defence. A punishment inflicted without the allowance of such benefit is in itself a gross violation of justice. There are cases, undoubtedly, which neither require nor admit of such a deliberate procedure. Such are cases where the criminal facts expose themselves to general notoriety, by the public manner in which they are committed, or where the necessity occurs of immediately opposing attempted acts of violence, by a prompt re-action of lawful force, as in the disorders of a commencing mutiny. These are cases that speak for themselves, and are of unavoidable dispensation. It may be matter of prudence, but is not matter of strict obligation in vessels of this kind, that the captain should communicate with other officers of the vessel; nor do I find that any particular mode or instrument of punishment has received a particular recognition: that must be left to the common usage practised in such cases, and to the humane discretion of the person who has the right of commanding its application" (k).

To this it may be added, that the offences which are most likely to call for the exercise of the master's authority to inflict personal

(k) "By the common law," said Chief Justice Tindal, in a recent case, "a similar power of moderate chastisement is given to the captain of a ship, as there is to a parent and a schoolmaster. Lord Tenterden often observed, that it was always desirable, and indeed the duty of the captain, to institute an inquiry, and have

the result of it entered on the log. It is his duty, because, by availing himself of the advice of others, he prevents himself from acting solely on his own feelings, which may be excited; and it is his interest, because it furnishes evidence in his favour, to be used on the day of trial. *Murray v. Moutrie*, 6 C. & P. 471.

punishment, disorder, disobedience, and mutiny, may not unfrequently be caused or aggravated by his own indiscretion and misconduct. He ought not to be extreme to mark what is done amiss (*k*). The law enjoins upon him a temperate demeanour and decent conduct towards seamen. He is fineable, by many of the sea laws, for abusive expressions (*l*); and though hasty words employed by him on occasions of emergency and excitement will be considered excusable, violent language used at the time of the correction, which is challenged, may indicate an undue violence of temper, and render him liable to be admonished: "that passion is not to be indulged in the infliction of punishment, and that he who has to command others should also command himself" (*m*). §

7. If the master strike a mariner without cause, or use a deadly weapon as an instrument of correction where moderate correction may be inflicted, and death ensue, he will be guilty either of manslaughter or murder (*n*), according to the rules and distinctions of the criminal law of *England* in analogous cases, all of which are applicable to persons in this situation; and all offences committed at sea may be tried under the Admiralty commission or the commission issued under the authority of the 4 & 5 Wm. 4, c. 36, and punished as if committed on shore (*o*). In the case of actual or open mutiny by the crew, or any part of them, the resistance of the master becomes an act of self-defence, and is to be considered in all its consequences from that point of view. The ordinances of *Oleron* (*p*) and *Wisbuy* (*q*) declare that a mariner who strikes the master shall either pay a fine or lose his right hand; a strange as well as cruel alternative, unknown in the modern jurisprudence of this country. But although the master may by force restrain the commission of great crimes, he has no judicial authority to punish the criminal, but ought to secure his person, and cause him to be brought before a proper tribunal of his country (*r*). And all justices of the peace are empowered to receive informations touching any murder, piracy, felony, or rob-

(*k*) New Phoenix, 1 Hag. 199.

(*l*) Mr. Justice Storey's Notes to the American Edition, p. 137.

(*m*) The Agincourt, 1 Hag. 290.

(*n*) Captain Kidd's Case, 5 State Trials, 287.

(*o*) 39 Geo. 3, c. 37; 7 & 8 Geo. 4, c. 28, s. 12; 7 & 8 Geo. 4, c. 30, s. 43;

7 & 8 Geo. 4, c. 27, s. 77; 9 Geo. 4, c. 31, s. 32.

(*p*) A. 12.

(*q*) A. 24.

(*r*) Hanseatic Ordinance, art. 30; French Ordinance, book 2, tit. 1; Du Capitaine, art. 23; Roccus, Not. 8.

bery upon the sea, and to commit the offenders for trial, or to admit them to bail in cases in which bail may by law be taken (s).

§ By the 5 & 6 Wm. 4, c. 19, s. 38, it is enacted, that in case of any assault or battery which shall, after the commencement of this Act, be committed on board any merchant ship in any place at sea, or out of his Majesty's dominions, it shall be lawful for any two justices of the peace, in any part of his Majesty's dominions, upon complaint of the party aggrieved, to hear and determine any such complaint, and to make such adjudication thereon as by the 9 Geo. 4, c. 31, any two justices are empowered to do; and the fine or forfeiture to be imposed in any such case shall be payable to the Merchant Seaman's Hospital or institution at or nearest to the part or place where such adjudication shall be made.

8. By the *French* ordinance (t), the master is prohibited, under pain of corporal punishment, from concealing, diverting, or selling any portion of the victuals of the ship, except to vessels which he may meet in the open sea, in a state of pressing necessity. Their wants he may, with the advice of his officers, relieve, provided he retain sufficient for his own voyage, and account to his owners for the proceeds of the victuals sold. The ordinance of the *Hanse Towns* contains a provision to the like effect, and *Valin* (u) tells us, that it extends not only to friends, but also to enemies, in the same manner as in shipwreck, or in battle, it is a duty to save the life of an enemy which has become the sport of the sea, or otherwise in danger of perishing. This, however, is a purely moral obligation, not founded on any positive law, nor compulsory on the master. The Court of Admiralty even has no power of remunerating for the preservation of life (v), and leaves all exertions for that object to the bounty of individuals. By the *Rhodian* law, also, the master may, in case of need, compel any individuals on board his ship to surrender for the common use such victuals as they may have.—“*Utique tamen non gratis, ut nihil restitui necesse sit, sed cum onere restituendi ubi necessitas cessaverit*” (w). The *French* ordinance and the code de commerce (x), also recognise this right and the duty of restitution. §

(s) 7 Geo. 4, c. 38.

(t) Ordonnance, liv. 2, art. 32, 33.

(u) Valin, liv. 2, tit. 1, Du Capitaine.

(v) The Aid, 1 Hag. 83.

(w) Vinnius, cited by Valin, supra.

(x) Code de Com. art. 249.

CHAPTER V.

OF BARRATRY.

1. THE term *Barratry*, which is often used as well by foreign writers as those of our own nation, is generally understood in this and in most other countries to denote a *fraudulent* act of the master or mariners committed to the prejudice of the owners of the ship (*a*). In *France* it is often used in a more enlarged sense, and comprehends acts of mere ignorance or unskilfulness not accompanied with a fraudulent design.

§ To our definition of barratry, it is not essential that the act should be done by the master, for his own benefit, or with the intent of injuring his owners. Thus, if he sail out of port without paying port duties, whereby the goods are forfeited, lost or spoiled (*b*), or if he cruise in quest of prizes without proper authority, and contrary to the orders of his owners (*c*), or if he disregard an embargo (*d*), or attempt a breach of a blockade (*e*), or be concerned in smuggling, or connive at smuggling by his mariners, (*f*) he is guilty of barratry. And where a master had general instructions to make the best purchases with despatch, it was considered that such instructions must mean *legal purchases* and *legal despatch*, and that going into an enemy's settlement to trade, although his cargo could be more speedily and cheaply completed there, (the ship being seized and confiscated on account of it,) was barratry (*g*). Nor was it thought to make any difference that he intended thereby to promote his owners' interest. It is not for him to judge in cases not intrusted to his discretion, or to suppose that he is not breaking the trust reposed

(*a*) Emerigon, tom. 1, 366. See the cases, Marshall's Law of Insurance, 518.

(*b*) In *Knight v. Cambridge*, 1 Stf. 581; 2 Lord Raym. 1349; *Stamma v. Brown*, 2 Strange, 1174.

(*c*) *Moss v. Byrom*, 6 T. R. 379.

(*d*) *Robinson v. Ewer*, 1 T. R. 127.

(*e*) *Goldschmidt v. Whitmore*, 3 Taunt. 508; *Everth v. Hannam*, 6 Taunt. 375.

(*f*) *Lockyer v. Offley*, 1 T. R. 252; *Pipon v. Cope*, 1 Campb. 434.

(*g*) *Earle v. Rowcroft*, 8 East, 126.

in him but acting meritoriously, when he endeavours to advance the interests of his owners by means which the law forbids, and which his owners must be taken to have forbidden, not only from what ought to be, and therefore must be presumed to have been, their own sense of public duty, but also from a consideration of the risk and loss likely to follow from the use of such means. But a matter entrusted to his discretion and not contrary to law, admits of a different consideration, and accordingly, when in an action on a policy of assurance, the loss being alleged by barratry of the master, it appeared that his ship having sprung a leak, he took her into port, and before any survey made, broke up her ceiling and end bows with crow bars, thereby injuring and weakening her, Lord *Ellenborough*, addressing the counsel for the plaintiff said, "To constitute barratry, which is a crime, the captain must be proved to have acted against his better judgment; as the case stands there is a whole ocean between you and barratry (*h*)."

Barratry may be committed by the owners or master against the general freighter, or with consent of the freighters against the owner (*i*). It would seem that one part owner being master may commit barratry against another (*k*), but if the master be sole owner he cannot commit barratry against himself (*l*) §

2. But though with us it does not denominate any crime punishable by law, yet several offences committed by the master and mariners, in violation of their trust and duty, and which fall within the definition of barratry, are punishable by different statutes, which I shall now proceed to mention.

First, as to the offence of wilfully destroying the ship. This is still, under circumstances of aggravation, punishable with death.

By the first statute passed on this subject, in which it was recited, that "it often happens that masters and mariners of ships having insured or taken upon bottomry, greater sums of money than the value of their adventure, do wilfully cast away, burn, or otherwise destroy the ships under their charge, to the merchants and owners great loss." It is enacted, "That if any captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away,

(*h*) *Todd v. Ritchie*, 1 Stark. Rep. 240.

(*i*) *Valleyo v. Wheeler*, Cowp. 143; *Soares v. Thornton*, 6 Taunt. 627.

(*k*) *Boutflower v. Wilmer*, 2 Selw.

976. *Bell's Principles of the Law of Scotland*, p. 188.

(*l*) *Ross v. Hunter*, 3 Term Rep. 33; *Nutt v. Bourdeaux*, 1 T. R. 323; *Stamma v. Brown*, 2 Strange, 1173.

burn, or otherwise destroy the ship, unto which he belongeth, or procure the same to be done, he shall suffer death as a felon" (*m*).

By the *second*, it is enacted, "That if any captain, master, mariner, or other officer belonging to any ship, shall wilfully cast away, burn, or otherwise destroy the ship, unto which he belongeth, or procure the same to be done, to the prejudice of the owner or owners thereof, or of any merchant or merchants, that shall load goods thereon, he shall suffer death as a felon" (*n*).

Further provisions were made in the reign of *George the first* (*o*), but soon after the determination of an important prosecution at the *Old Bailey* (*p*), and I presume in order to remedy a defect in the law manifested on that occasion, they were repealed (*q*), except as to prosecutions for offences committed before the 16th of July 1803 (*r*), and other provisions substituted by the 43 Geo. 3, c. 113, which was in force when the last edition of this work was published.

§ The 9 Geo. 4, c. 31, repeals the 43 Geo. 3, c. 113. So much of the 22 & 23 Car. 2, c. 11, as relates to the wilful destruction of any ship by any of the persons belonging to it; and so much of the 33 Geo. 3, c. 67, as relates to persons who shall wilfully and maliciously set fire to or destroy or damage otherwise than by fire, any ship, keel, or other vessel, were repealed by the 7 & 8 Geo. 4, c. 27. Other provisions upon this subject were made by the 7 & 8 Geo. 4, c. 30, which except those contained in the tenth section as to damage done otherwise than by fire (and offences committed previously to or upon the 30th of September 1837) are now also repealed, and it is enacted,

"That whosoever shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, either with intent to murder any person, or whereby the life of any person shall be endangered, shall be guilty of felony, and being convicted thereof shall suffer death" (*s*).

(*m*) 22 & 23 Car. 2, c. 11, s. 12.

(*n*) 1 Anne, stat. 2, c. 9, s. 4.

(*o*) 4 Geo. 1, c. 12, s. 3; 11 Geo. 1, c. 29, s. 5, 6, and 7.

(*p*) The case of *Easterby v. Macfarlane*, Addenda to East's P. C. p. 26.

(*q*) *Id* sect. 4.

(*r*) 43 Geo. 3, c. 113. See cap. 79 of the same year as to Ireland.

(*s*) 7 Wm. 4 and 1 Vict. c. 89, s. 4. A pleasure boat, eighteen feet long, was set fire to, and Patteson, J., inclined to think it was a vessel within the meaning of the act. *R. v. Bowyer*, 4 C. & P. 559. Upon an indictment for firing a barge, Alderson, J., said, "that if the prisoner was convicted, he would take the

"That whosoever shall unlawfully exhibit any false light or signal, with intent to bring any ship or vessel into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship or vessel in distress, shall be guilty of felony, and being convicted thereof shall suffer death. (t)

"That whosoever shall unlawfully and maliciously set fire to, or in anywise destroy any ship or vessel, whether the same be complete or in an unfinished state, or shall unlawfully and maliciously set fire to, cast away, or in anywise destroy any ship or vessel, with intent thereby to prejudice any owner, or part-owner of any such ship or vessel, or of any goods on board the same, or any person that hath underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years. (u)

"That whosoever shall by force prevent or impede any person endeavouring to save his life from any ship or vessel which shall be in distress or wrecked, stranded, or cast on shore, (whether he shall be on board, or shall have quitted the same) shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years (v).

"That whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandize, or articles of any kind, belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fifteen years, nor less than ten years, or to be imprisoned for any term not exceeding three years." (w)

opinion of the judges, whether a barge
was within the meaning of the statute."
R. v. Smith, 4 C. & P. 569.

(t) Sect. 5.

(u) Sect. 6.

(v) Sect. 7.

(w) Sect. 8.

3. Secondly, as to the offences of running away with the ship or cargo, and of making a revolt in the ship.

By a statute passed in the reign of King *William* 3 (x), it is enacted, "That if any commander or master of any ship, or any seaman or mariner, shall in any place, where the admiral hath jurisdiction, betray his trust and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods or merchandizes; or yield them up voluntarily to any pirate, or shall bring any seducing messages from any pirate, enemy, or rebel, or consult, combine or confederate with, or attempt or endeavour to corrupt any commander, master, officer, or mariner, to yield up or run away with any ship, goods, or merchandizes, or turn pirate, or go over to pirates, or if any person shall lay violent hands on his commander whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make or endeavour to make a revolt in the ship, shall be adjudged, deemed, and taken to be a pirate, felon, and robber, and being convicted thereof according to the directions of this Act, shall have and suffer pains of death, loss of lands, goods, and chattels, as pirates, felons, and robbers upon the seas, ought to have and suffer" (y). § By the 18 Geo. 2, c. 30, it was enacted, "That subjects or denizens committing hostilities at sea against his Majesty's subjects, or giving aid to his enemies at sea, should be tried and punished as pirates. And now, by 7 Wm. 4 & 1 Vict. c. 88, s. 3, "That persons convicted of any offence which by the acts referred to in this section, amounts to piracy, shall be liable to be transported for life, or for any term

(x) 11 & 12 Wm. 3, c. 7, s. 9, made perpetual by 6 Geo. 1, c. 19.

(y) § By Stat. 28 Hen. 8, c. 25, "For pirates," it is enacted, that treasons, felonies, robberies, murders, manslaughter and other offences committed on the sea, shall be punished in the same manner as if committed on land."

Provided that this act extend not to be prejudicial or hurtful to any persons for taking any victual, cables, ropes, anchors, or sails, which any such persons (compelled by necessity) take of, or in any

ship which may conveniently spare the same; so the said persons pay out of hand, money or money's worth to the value of the things so taken, or deliver for the same a sufficient bill obligatory to be paid in form following, that is to say, "If the taking of the same things be on this side of the straits of Marroke, then to be paid within four months, and if it be beyond the straits of Marroke, then to be paid within twelve months." See also ante, Part 2, c. 4, s. 8.

not less than fifteen years, or to be imprisoned for any term not exceeding three years.

4. Thirdly, as to the offence of not resisting pirates and enemies (*a*). It appears formerly to have been a practice with the *Turkish* pirates to restore a ship, and the goods of the master and mariners, and sometimes even to pay the whole, or a part of the freight, if the ship yielded to them, and they were suffered to take out the cargo without resistance. To prevent this practice, a statute was passed so long ago as the reign of King *Charles 2*, in the preamble whereof this practice is recited, and by which the master of any vessel of a burthen not less than two hundred tons, and furnished with sixteen guns, is forbidden to yield his cargo to pirates of any force, without resistance, on pain of being rendered incapable to take charge of any *English* vessel afterwards. And if the ship is released, and any thing given by the pirates to the master, such gift and his share of the ship are to go to the owners of the goods. And any ship of less burthen or force than before mentioned, is forbidden to yield to a *Turkish* pirate, not having double her number of guns, without fighting (*b*) ; an extraordinary instance of the courage and skill which the Legislature of those times attributed to *English* seamen, and which the exploits of succeeding generations have so often and so gloriously exemplified !

§ By the same statute it is enacted, “ That if the mariners or inferior officers of any *English* ship, laden with goods and merchandizes as aforesaid, shall decline or refuse to fight and defend the ship, when they shall be thereunto commanded by the master or commander thereof, or shall utter any words to discourage the other mariners from defending the ship, that every mariner who shall be found guilty of declining or refusing as aforesaid, shall *lose all his wages* due to him, together with such goods as he hath in his ship, and suffer imprisonment, not exceeding the space of *six* months, and shall during such time, be kept to hard labour, for his or their maintenance ” (*c*). §

(*a*) See Hanseatic Ordinance, art. 35, 2, c. 11.
36, 37, and Roccus, Not. 70.

(*b*) 16 Car. 2, c. 6, and 22 & 23 Car.

(*c*) 22 & 23 Car. 2, c. 11, s. 7.

CHAPTER VI.

OF THE ENCOURAGEMENT AND PROTECTION OF MERCHANT SEAMEN.

1. THE Legislature has not been less studious to reward and provide for deserving mariners, than to punish the fraudulent or the fearful.

To this purpose it has been enacted (a), “That when any *English* ship shall have been defended against any pirates, enemies, or sea-rovers by fight, and brought to her designed port, in which fight any of the officers or seamen shall have been killed or wounded, it shall and may be lawful to and for the Judge of His Majesty’s High Court of Admiralty, or his Surrogate in the port of *London*, or the mayor, bailiff, or chief officer in the several out-ports of this kingdom, upon the petition of the master or seamen of such ship, so defended as aforesaid, to call unto him four or more good and substantial merchants, and such as are no adventurers or owners of the ship or goods so defended, and have no manner of interest therein, and by advice with them to raise and levy upon the respective adventurers and owners of the ship and goods so defended, by process out of the said Court, such sum or sums of money, as himself and the said merchants by plurality of voices shall determine and judge reasonable, not exceeding *two pounds per centum* of the freight, and of the ship and goods so defended, according to the first cost of the goods; which sum or sums of money, so raised, shall be distributed among the captain, master, officers and seamen of the said ship, or widows and children of the slain, according to the direction of the Judge of the said Court, or his Surrogate in the port of *Lon-*

(a) 11 & 12 Wm. 3, c. 7, s. 11. See also 22 & 23 Car. 2, c. 11, s. 10.

By the Hanseatic Ordinance, art. 53, a seaman disabled in defending a ship against rovers, is to be maintained during his life

at the common charge of the concerned in a general average. And the Hanseatic Ordinance of the year 1614 is to the same effect. Tit. 14, art. 3.

don, or the mayor, bailif, or chief officer in the several out-ports of this kingdom, with the approbation of the merchants aforesaid, who shall proportion the same according to their best judgment unto the ship's company as aforesaid, having special regard unto the widows and children of such as shall have been slain in that service, and such as have been wounded or maimed."

By two subsequent statutes, seamen in the merchants' service disabled in fight against a *pirate* (b), or *enemy* (c) were to be admitted into and provided for in *Greenwich Hospital*, the great asylum for decayed and disabled seamen belonging to the royal navy; but that hospital being found insufficient for this addition to the primary objects of its institution, another national establishment was erected by the 20 Geo. 2, c. 38.

§ By that act a corporation was created, composed chiefly of eminent merchants, by the name of "*the President and Governors for the relief and support of maimed and disabled seamen, and the widows and children of such as shall be killed, slain, or drowned in the merchants' service.*" To this corporation the management of the fund to be raised under the provisions of the act was entrusted, with power to purchase land and erect an hospital; to supply vacancies that might occur in the places of president, assistants, governors, and members, and for making and altering the bye-laws, constitutions, and ordinances of the said corporation.

This statute, except so much of it as is above stated, was repealed by the 4 & 5 Wm. 4, c. 52; and by this latter act it is now provided, "That the said president and governors, and their successors, shall and may provide in such their hospital, for the reception of such seamen as shall be rendered incapable of service by sickness, wounds, or other accidental misfortunes, and those who shall become decrepid or worn out by age; or shall provide for such seamen by allowing them certain pensions, or otherwise, as shall seem meet and most for the advantage of the said charity, and also relieve the widows and children of such seamen as shall be killed, slain, or drowned in the said service, and also relieve the widows and children of such seamen as shall die after having contributed, during a term of twenty-one years, to the funds of the corporation, provided such children are not

(b) 8 Geo. 1, c. 24.

(c) 8 Geo. 2, c. 29, s. 10.

of the age of fourteen years, or, if of that age or upwards, not capable of getting a livelihood, by reason of lameness, blindness, or other infirmities, and are proper objects of charity; and also relieve the widows and children (such children being proper objects of charity as aforesaid) of such seamen as, at the time of their death, shall have been receiving, or have been entitled to receive, pensions, under and by virtue of this act, from the fund to be created, as decrepid or worn-out seamen; and that no seaman shall be provided for, by a pension or otherwise, as decrepid or worn-out, unless such seaman shall have served in the merchant service for the space of five years, and shall have, during that time, paid the contribution required to be paid by the act of the 20 Geo. 2, or by this act" (*d*). And in providing for this class, a preference is to be given to such as have served longest and contributed most (*e*).

To provide a fund for this charitable institution, all masters of merchant ships, and owners working their own ships, are to pay two shillings per month, and all seamen or other persons employed in any merchant ship, one shilling per month (*f*). The master is to deduct this monthly duty from the wages of the seamen, and to pay it, as also the amount due and owing from himself, to the receivers appointed under the authority of the act (*g*). And in order to ascertain the times of service and payment of the contribution, the master, or other person having care of the ship, must keep a muster roll or account of the ship's company, in a form prescribed by the act, and signed by himself, in which shall be entered his own Christian and surname, and the Christian and surnames of all the officers, seamen, and other persons employed in the ship, and against each name, the age, place of birth, and quality of such seaman, or other person, and the time and place when he entered into the service of such ship or vessel. He must also, during the whole course of the voyage, continue to keep the muster roll, and from time to time enter therein when and where any such master, officer, seaman, or other person, shall be discharged from, or shall leave or desert such ship, and when and where any other officers and men shall be shipped on board, describing them as the persons who first entered on board are

(*d*) 4 & 5 Wm. 4, c. 52, s. 2.

(*e*) Sect. 25.

(*f*) Sects. 5 & 6.

(*g*) Sect. 7.

directed to be described, and when and where any of them received any hurt or damage, or were killed, slain, or drowned, or otherwise happened to die; together with a statement of the amount of wages due to them at the time of death or desertion, and of what clothes or other effects such deceased man shall have left on board; a duplicate of which account shall, if required, be signed by the master, and delivered to the collectors or receivers of the duties at whatever port in *Great Britain* or *Ireland*, any ship shall report or discharge her cargo; and if any master or other person neglect to keep such account or muster roll, or to deliver when required such duplicate, he shall forfeit and pay for every such refusal or omission the sum of 5*l.* (*h*). The collectors and receivers of these duties are empowered to summon the masters, or, in their absence, the owners of vessels, and examine them on oath as to the truth of the muster rolls, and as to the number and times of service of all persons belonging to the ship, and chargeable with the duties; and if such masters or owners shall neglect to appear, or obstinately refuse to make a full and true discovery of the matters aforesaid, every such offender shall for every such refusal, forfeit the sum of 10*l.* (*i*).

And in case any seaman, or other person employed on board any merchant ship, shall, in doing his duty on shore or on board any such ship while in a port other than that to which the said ship shall belong, break an arm or leg, or be otherwise hurt or maimed, so that it is necessary immediate care should be taken of him, he is to be properly relieved, until sufficiently recovered to be sent to the place to which the ship belongs (*j*).

These are the principal objects of this excellent institution. Several provisions for carrying them into effect are contained in the statute, of which the detail would be improper for this place. The act will be found in the Appendix. §

2. By the ancient marine ordinances, (and by 5 & 6 Wm. 4, c. 19,) s. 18, if a mariner falls sick during a voyage, or is hurt in the performance of his duty, he is to be cured at the expense of the ship, but not if he receives an injury in the pursuit of his own private concerns (*k*).

(A) 4 & 5 Wm. 4, c. 52, s. 9.

(i) Sect. 11.

(j) Sect. 27.

(k) Laws of Oleron, art. 6; of Wisbuy,

art. 18; of the Hanse Towns, art. 39, &c.
Sec^r Cleirac on the Laws of Oleron ubi
supra.

If by shipwreck, capture, or any cause, whatever, any seafaring men or boys, subjects of *Great Britain*, are cast away, or left, or be in distress in foreign parts, the governors, minister, and consuls appointed by his Majesty, or, where none such are resident, two or more *British* merchants there residing, are required, under a penalty of 100*l.* for each man or boy, to provide for and subsist them, and for so doing, they are to be allowed so much *per day*, as shall or hath in this respect been authorized by the commissioners for executing the office of Lord High Admiral; (for the amount of which disbursements they are to send bills, with proper vouchers, to the commissioners of the navy), and to put them on board the first ship belonging to his Majesty that arrives there, or within a convenient distance; and in case no such ship shall be found, to send them on board such merchant ships bound for *Great Britain* as shall be in want of men: and if neither case happens within a convenient time, to provide them a passage homeward in the first merchant ship bound for *Great Britain*, the master of which is bound to receive not exceeding *four* persons for every one hundred tons of his ship's burthen; and he is to be paid by the said commissioners of the navy for such of them as he did not want toward his own complement of men, according to such rate *per day* as in that behalf shall be or hath been authorized by the commissioners for executing the office of Lord High Admiral (*l*).

If a master of a merchant ship being abroad shall force any man on shore, or wilfully leave him behind in any of his Majesty's plantations, or elsewhere, or refuse to bring home again such men carried out with him as are in a condition to return, when he shall be ready to proceed in his homeward-bound voyage, every such master shall, being thereof legally convicted, suffer *three months' imprisonment* (*m*). This provision is extended by the 5 & 6 Wm. 4, c. 19, to any person belonging to his crew, whether part of the original crew or not, wrongfully left behind on shore, or at sea, and the offence is by that statute declared to be a misdemeanor, which may be prosecuted by information at the suit of the attorney-general, or by indictment or other proceeding, in any court of criminal jurisdiction at home or abroad, and be

(*l*) 11 Geo. 4, and 1 Wm. 4, c. 20, s.

(*m*) 11 & 12 Wm. 3, c. 7, s. 18.

punished by fine or imprisonment, or both, as to such Court shall seem meet (n).

And when any person so forced on shore or left behind, shall be relieved under the provisions of the 11 Geo. 4 and 1 Wm. 4, c. 20, then in addition to the wages due from, and the penalties imposed on, such master, his Majesty shall be entitled to sue such master, or owner, for all the charges and expenses which shall have been incurred in the subsistence, necessary clothing and conveyance home of any such person, as so much money paid, laid out, and expended to the use of the defendant, which together with full costs of suit, may be recovered in the same manner as other debts due to his Majesty, are recoverable in any Court having jurisdiction in cases of debts due to the crown.

(n) 5 & 6 Wm. 4, c. 19, s. 40.

(o) Sect. 47.

CHAPTER VII.

OF PILOTS.

THE name of pilot, or steersman, is applied either to a particular officer, serving on board a ship during the course of a voyage, and having the charge of the helm and of the ship's route; or to a person taken on board at a particular place for the purpose of conducting a ship through a river, road, or channel, or from or into a port. The *French* Ordinance contains several regulations calculated to obtain the necessary skill and experience in persons of the first description (*a*). In this country there is no particular provision relating to them, and many ships are navigated without an officer of this description, the master taking upon himself the charge of the helm, and the conduct of the vessel.

Pilots of the *second* description are established at several places in this country by ancient charters of incorporation (*b*). And *in general* the master of a ship engaged in foreign trade must put his ship under the charge of such a pilot, both in his outward and homeward voyage, within the limits of every such establishment (*c*). An account of these establishments, and of the ports to which they relate, would be improper in a general treatise; and masters of vessels may easily acquaint themselves with the regulations on this subject relating to the particular navigation in which they are employed.

(*a*) Liv. 2, tit. 4, Du Pilote.

(*b*) Pilotage from Dover, Deal, and the Isle of Thanet, up the rivers Thames and Medway, was regulated by statutes 3 Geo. 1, c. 13; 7 Geo. 1, c. 21, and 43 Geo. 3, c. 152, revived and continued by 47 Geo. 3, stat. 2, c. 71, P. L. & P. Pilotage down the Thames, and through the North Channel, to or by Orfordness, and round the Long-sand-head into the Downs, and down the South Channel in-

to the downs, and from or by Orfordness up the North Channel, and the Thames and Medway, by 5 Geo. 2, c. 20. Pilotage into and out of the port of Liverpool, is regulated by 37 Geo. 3, s. 78, and the port of Hull by 39 & 40 Geo. 3, c. 10, P. L. & P.

(*c*) *Law v. Hollingsworth*, 7 Term Rep. K. B. 160, 52 Geo. 3, c. 39, s. 59; *Phillips v. Headlam*, 2 B. & Ad. 380.

1. Pilotage up and down the rivers *Thames* and *Medway* was regulated by several statutes (*d*), which were much improved by a temporary Act passed in the 48th year of the reign of King *George III* (*e*): but all the regulations relating to these districts have since been consolidated into one Act of Parliament (*f*), which also contains some general provisions applicable to all parts of the kingdom. The more important of these provisions will be shortly mentioned in the present chapter, and the Act, with the exception of the tables of rates, will be printed at large in the *Appendix*.

One of the former statutes which required an established pilot to be taken on board to conduct ships from *Dover*, *Deal*, or the *Isle of Thanet*, up the *Thames* or *Medway*, contained an exception, allowing "the master or mate of any ship or vessel, or part-owner, residing at *Dover*, *Deal*, or the *Isle of Thanet*," to conduct his own ship from any of those places up the said rivers (*g*). The meaning of this clause appears sufficiently obvious; yet it was once contended, that a master and part-owner, not resident at either of those places, might pilot his own ship up the *Thames*, on his return from a foreign voyage to *London*. But the Court of King's Bench thought the meaning of the Legislature to be otherwise, and determined that the master was subject to the penalty imposed by the statute (*h*). The new statute allows the persons before mentioned to conduct their own ships up or down the said rivers, or into or out of any port or place within the jurisdiction of the *Cinque Ports* (*i*).

But both the before-mentioned statutes and that (*k*) which regulated pilotage down the river *Thames*, applied only to ships in the course of their navigation. And the Court of King's Bench decided that the *mate* of a ship engaged in the *Lisbon* trade, who steered the ship, which at the time was not quite cleared of her homeward cargo, and had a Custom-house officer on board, down the river *Thames*, from *Horseleydown New Stairs* to *Cherry Gardens*, being about half a mile, and from thence to *Fountain Stairs*, was not subject to the penalty: for otherwise the station

(*d*) Ante, note b, p. 173.

(*e*) 48 Geo. 3, c. 104.

(*f*) 6 Geo. 4, c. 125, printed in the Appendix, and repealing the statute 52 Geo. 3, c. 39, which was also a consolidating act, and contained some general

provisions.

(*g*) 3 Geo. 1, c. 13.

(*h*) Kemler v. Blanchard, 2 Blac. 690; 5 Burr. 2602.

(*i*) 6 Geo. 4, c. 125, s. 62.

(*k*) 5 Geo. 2, c. 20.

of a ship could not be changed for the purpose of delivering or receiving goods at different wharfs without the expense of pilotage (*l*). In like manner, where a ship had been conducted by a regular pilot up the river *Thames* to *Limehouse-hole*, and was left by him, and afterwards moored there, but being forced by the wind upon the mud, lay four days in a bad situation, and it becoming dangerous for her to remain there till the tide should ebb again, she was conducted by a *waterman* about a mile and a half further up the river; the Court referring to its former decision, and considering the voyage in this case to have been ended, when the ship was left at *Limehouse* by the pilot, determined that the waterman was not subject to the penalty (*m*).

By the new statute it is expressly provided, "That when any ship or vessel shall have been brought into any port or ports in *England*, by any pilot duly licensed, nothing therein contained shall extend, or be construed to extend, to subject to any penalty the master or mate, or other person belonging to such ship or vessel, and having the command thereof, or if in ballast, any other person or persons appointed by any owner or master, or agent of the owner thereof, afterwards removing such ship or vessel in such port or ports, for the purpose of entering into, or going out of any dock, or for changing the moorings of such ship or vessel (*n*)."

2. The charge of pilotage is regulated at different places by usage or by statute, and generally increases in proportion to the depth of water which the vessel draws. It was determined that this charge under the old statutes, where the service was performed in a river within the body of a county, could not be recovered by a suit in the Court of Admiralty (*o*). The rates prescribed by the statute 3 Geo. 1, c. 13, have been held applicable only to the *Trinity-house* pilots, and not binding upon another person, who in their absence takes the charge of a ship in pursuance of

(*l*) *Rex v. Lambe*, 5 Term Rep. K. B. 76, and Nolan's Rep. 156.

(*m*) *Rex v. Neale*, 8 Term Rep. K. B. 241. In this case, it was stated that the ship might have been removed to the pier, either immediately above or below *Limehouse-hole*, and have been perfectly safe without going any further; and therefore, the case was not within the

seventh section of 3 Geo. 1, c. 13, which provides that the act shall not extend to hinder any person from assisting a ship in distress at any time.

(*n*) 6 Geo. 4, c. 125, s. 63, as to what is a change of mooring; see *M'Intosh v. Slade*, 5 B. & C. 657, post.

(*o*) *Ross v. Walker*, 2 Wils. 264.

the proviso in the third section of that statute (*p*). These decisions may also apply to the new statute (*q*).

By the new statute, all sums which shall become due to any licensed pilot for the pilotage of any ship or vessel, except ships and vessels not having *British* registers, trading to or from the port of *London*, "may be recovered from the owners or masters of such ship or vessel, or from the consignees or agents thereof, who shall have paid or made themselves liable to pay any other charge for the ship or vessel in the port of her arrival or delivery as to pilotage inwards, and in the port from whence she shall clear out or sail, as to pilotage outwards;" and may be levied in like manner according to the amount as any penalty may be recovered and levied by virtue of the Act, demand thereof being made in writing at least *fourteen* days before such levy (*r*). And the masters or other persons having the charge of ships or vessels, *not having British registers*, which shall enter into or sail from the port of *London*, and which are by law required to be piloted by persons licensed by the corporation of the Trinity-house, or the consignees or agents thereof, are to pay at the Trinity-house in *London*, to persons appointed by the corporation of the Trinity-house, the full pilotage inwards and outwards; viz. as to pilotage outwards, the amount for the distance which the ship is by law required to be piloted; as to pilotage inwards, where a pilot shall have been on board, the amount for the distance piloted by him if greater than that which she shall be required to be piloted; if less, or if no pilot shall have been on board, the amount for the distance which she was by law required to be piloted: the pilotage inwards may be levied, &c. upon the master or other person in charge, consignee, or agent, in the same manner as in the case of ships, *having British registers*, if such pilotage inwards be not paid within *fourteen* days from the day of the ship's reporting inwards. But the corporation of the Trinity-house are enabled to make regulations for the relief of such ships and vessels not having *British* registers as may come to the port of *London* with fish, corn, or other provisions (*s*).

"The consignees or agents of any ship or vessel are by this

(*p*) *The Nelson*, Main, 6 Rob. Ad. Rep. 227.

(*q*) 6 Geo. 4, c. 125.

(*r*) 6 Geo. 4, c. 125, s. 44.

(*s*) Sect. 46 and 51.

Act authorized and empowered to retain in their hands respectively out of any monies which they may have received, or shall thereafter receive for, or on account of, such ship or vessel, or the owner or owners thereof, so much as shall be sufficient to pay and discharge such pilotage and any expenses attending the same (t).

If the officer of a king's ship, or master, or other person having the command of any other ship or vessel, takes a pilot to sea, beyond the limits of his district, without his free consent, except under circumstances of absolute and unavoidable necessity, the pilot is entitled, over and above his pilotage, to receive 10*s.* 6*d.* per day, to be computed from, and inclusive of the day next after the day on which the vessel passes the limit to which he was engaged, until he shall be returned to the place where he was taken on board, or until he shall have been discharged from the vessel a sufficient time to have enabled him to return there (u).
 v. Vessels bound to the *Thames*, and which shall repair to any place appointed for the performance of quarantine, are to pay the full charges of pilotage up to that place, and also the further sum of 8*s.* per day for the days the pilot shall be obliged to remain on quarantine (x).

3. Penalties not exceeding 20*l.* are to be recovered before a justice, by prosecution within *six* months; and penalties *above* 20*l.*, by action of debt in any of the Courts of Record at *Westminster*, to be commenced within *twelve* months; but if it shall be made to appear, as soon after as the circumstances of the case will admit, that the commencement of the prosecution or action has been delayed by reason of the absence of any party or parties, whether offending or complaining, or of any necessary witness, then upon such circumstances being stated by affidavit, made before any judge of any of his Majesty's Courts of Record at *Westminster*, any such judge may order or authorize the commencement of the prosecution or action, within such further time as he shall think fit to limit (y).

It is, however, provided by the statute, that nothing therein contained, shall affect or impair the jurisdiction of the Court of Load-manage, or High Court of Admiralty (z), nor the right of

(t) 6 Geo. 4, c. 125, s. 45.

(u) Sect. 38.

(x) Sect. 41.

(y) Sect. 76 and 77.

(z) Sect. 87.

the City of *London*^(a), nor (in general) any separate jurisdictions established under any act of Parliament or charter^(b).

The master of any ship or vessel, who shall act himself as a pilot, or employ any unlicensed person, or licensed person acting out of his limits, or beyond the extent of his qualification, after a licensed and qualified pilot shall have offered himself, or made signal for that purpose, shall forfeit double the sum which would have been demandable for the pilotage; and if the Trinity House, or Lord Warden of the Cinque Ports, as the case may be, shall think it proper, and certify in writing, he shall also forfeit 5*l.* for every fifty tons burthen of his ship^(c).

A master of a ship coming from the westward to *London*, having performed quarantine at *Standgate Creek*, and being about to quit that place, discharged the Cinque Port pilot who had conducted the vessel thither, and was desirous of proceeding with her, and then hoisted a flag for a pilot from *Sheerness*, and moved his ship onward toward *London*, but within the limits of the port of *Rochester*, for the space of a mile, before a pilot from *Sheerness* came on board; it was held, that the master was liable to the penalty under the 34th section of 52 Geo. 3, c. 39, which, for this purpose, does not seem to differ from the section of the new act, which I have last abridged^(d). But in order to subject the master to a penalty for continuing an unlicensed pilot, after a pilot duly licensed and qualified offers to take charge of the ship, it must appear that such offer was made to or in the presence of the master^(e). I presume, however, that if the master should have given orders to his mate or other person, not to receive a pilot, an offer to such person would be considered as an offer to the master himself. And it has been enacted, that the penalties are not incurred, unless the pilot offering his services shall, at the same time, produce his license, which he is bound to do, under a penalty of 30*l.*^(f).

4. § With respect to the pilotage in the rivers *Thames* and *Medway*, it is enacted, that it shall be lawful for the Lord Warden of the Cinque Ports, and Constable of *Dover* Castle, or his lieutenant, to appoint and license fit and competent persons, duly skilled as

(a) 6 Geo. 4, c. 125, s. 88.

(b) Sect. 89.

(c) Sect. 58.

(d) *Thornton v. Boland*, 2 Bing. 219.

(e) *Peake, (qui tam) v. Carrington*, 2 B. & B. 399, and 5 B. Mo. 176.

(f) Sect. 66. *Hammond v. Blake*, 10 B. & C. 424.

pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing from or by *Dungeness*, up the rivers *Thames* and *Medway* to *London Bridge*, and *Rochester Bridge*, and the several channels, creeks, and docks of the same; and from the south buoy of the *Brake* to the westward, as far as the west end of the *Owers*; and all such vessels shall be conducted and piloted within the limits aforesaid, by such pilots so appointed and licensed, and by no other pilots (g).

A proper and sufficient number of Cinque Port pilots, not less than eighteen at any one time, shall at all seasonable times by day and night, constantly ply at sea, or be afloat between the *South Foreland* and *Dungeness*, to take charge of ships and vessels coming from the westward, and such pilots shall not allow any ship or vessel having a signal for a pilot flying, to pass, without attempting to board her. §

A forfeit of double the sum which would have been demandable for the pilotage is to be paid by the person in command of a ship coming from the westward, and bound to any place in the *Thames* or *Medway*, who, not having a duly qualified Cinque Port pilot on board, shall not, on the arrival of his vessel off *Dungeness*, and until she shall have passed the south buoy of the *Brake*, or have been at anchor for one hour, display the usual signal for a pilot; and if any duly qualified Cinque Port pilot shall be within hail, or approach him within half a mile, with the proper distinguishing flag flying in his vessel or boat, shall not by all practicable means facilitate such pilot getting on board, and give the charge of piloting the vessel to him; or who shall, within the limits aforesaid, decline to take on board the first duly qualified Cinque Port pilot who shall offer, or to give charge of the vessel to such pilot; but if any ship coming from the westward, and bound to any place in the said rivers, shall anchor any where in the *Downs* between the *South Foreland*, and the line drawn from *Sandown Castle* to the south buoy of the *Brake*, having any licensed pilot, other than a duly qualified Cinque Port pilot on board, it shall not be necessary to display the signal any longer than for one hour next after the ship shall have anchored; and at any time before the ship shall have been at anchor one hour with the signal flying, any duly qualified Cinque Port pilot may repair on board, and take charge of the ship up the said rivers (h).

(g) 6 Geo. 4, c. 125, s. 14.

(h) Sect. 19.

A decision of the Court of Common Pleas on the eleventh section of 52 Geo. 3, is equally applicable to this section of the new Act. The judgment is this; that the penalties for not taking a pilot on board as soon as the vessel passes *Dungeness*, are to be ascertained by the voyage, which she is *about* to perform, and which the Act directs she shall not perform without a pilot; if, therefore, a vessel be bound for the river, the penalties imposed are not on the pilotage due from *Dungeness* to the *Downs*, but on that which would be due on the ship's arrival at her *ultimate* place of destination in the river (i).

§ By the 9 Geo. 4, c. 86, Cinque Port Pilots, unless qualified by actual survey of the river *Thames* above *Gravesend* previously to the passing of the Act, and licensed before the 29th of September, 1828, shall, if in charge as pilots of vessels, westward of the town quay of *Gravesend*, in the *Thames*, and westward of *Standgate Creek*, in the *Medway*, be deemed to be acting out of the limits for which they are qualified, and beyond the extent of their qualification. §

5. The master, however, of the following vessels may pilot the same so long as he is not assisted by any unlicensed pilot or other person than the ordinary crew: viz. "The master of any collier, or of any ship or vessel trading to *Norway*, or to the *Cattegat* or *Baltic*, or round the *North Cape*, or into the *White Sea*, on their inward or outward voyages, or of any constant trader inwards, from the ports between *Boulogne* inclusive, and the *Baltic* (all such ships or vessels having *British* registers, and coming up either by the *North Channel*, but not otherwise), or of any *Irish* trader using the navigation of the rivers *Thames* and *Medway*, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone, from *Guernsey*, *Jersey*, *Alderney*, *Sark* or *Man*, and being the production thereof, or of any ship or vessel, not exceeding the burthen of sixty tons, and *having a British register*, [or not exceeding the burthen of sixty tons, and *not having a British register*, if authorized so to do, by an order of the Privy Council (j)]; or of any other ship or vessel whatsoever, whilst the same is within the limits of the port or place to which she

(i) *Mackie v. Landon*, 6 Taunt. 256; (j) 6 Geo. 4, c. 125, s. 60.
1 Marsh. 585.

belongs, the same not being a port or place, in relation to which particular provision hath heretofore been made by any Act or Acts of Parliament, or by any charter or charters for the appointment of pilots" (*k*).

As to *Irish* traders and coasting vessels, the words in the former Act 52 Geo. 3, c. 39, s. 2, were different, and gave rise to two decisions; the words were, "All coasting vessels, and all *Irish* traders, using the navigation of the river *Thames* as coasters;" the decisions were, 1st. That the phrase, "all coasting vessels," is a general exemption, extending to all vessels in the coasting trade, and is not restricted by the subsequent words to such coasting vessels only, as navigate the river *Thames* as coasters (*l*). 2. That a vessel not engaged in the corn trade, and which, during the eight preceding years, had been employed as a trader between *Belfast* and *London*, except one voyage, when she went to *Liverpool*, and which at the time in question was laden with a general cargo, proceeding down the river *Thames* from *London* to *Belfast*, did not come within this exemption (*m*).

By another statute passed in the same year, it is enacted, that all trade by sea from any one part of the United Kingdom to any other part thereof, or from one part of the *Isle of Man*, to another thereof, shall be deemed to be a coasting trade, and all ships while employed therein shall be deemed to be coasting ships; and that no part of the United Kingdom however situate with regard to any other part thereof, shall be deemed in law with reference to each other, to be parts beyond the seas in any matter relating to the trade or navigation or revenues of this realm (*n*).

6. It is also provided, "That this Act shall not extend or be construed to extend to subject the master or owner of any ship or vessel, to any of the penalties of this Act, for employing any person or persons whomsoever, as a pilot or pilots, in and for the assistance of such ship or vessel, whilst the same shall be in distress, or in consequence thereof, or under any circumstances, which shall have rendered it necessary for such owner or master to avail himself of the best assistance which at the time could be procured (*o*).

(*k*) 6 Geo. 4, c. 125, s. 59.

112, and 6 B. Mo. p. 387.

(*l*) *Usher, (qui tam) &c.*, v. *Lyon*, 2 Price, 118.

(*n*) 6 Geo. 4, c. 107, s. 100.

(*o*) 6 Geo. 4, c. 125, s. 61.

(*m*) *Davison v. Mekibben*, 3 B. & B.

7. The Act enacts, "That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whatsoever, from or by reason or means of no licensed pilot, or of no duly qualified pilot being on board thereof, unless it shall be proved that the want of such licensed or of such duly qualified pilot respectively shall have arisen from any refusal to take such licensed or qualified pilot on board, or from the wilful neglect of the master of such ship or vessel in not heaving to, or using all practicable means, consistently with her safety, for the purpose of taking on board thereof any pilot who shall be ready and offer to take charge of the same" (*p*).

And "nothing in this act contained shall extend, or be construed to extend, to make the owner of any ship or vessel liable in any such case, for any loss or damage beyond the value of such ship or vessel, and her appurtenances, and the freight due or to grow due, for and during the voyage wherein such loss or damage may happen or arise" (*q*).

And it is also enacted, "That no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever, from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof" (*r*).

And it is provided, "that nothing in this act contained shall extend or be construed to extend, to deprive any person or persons of any remedy or remedies, upon any contract of insurance, or of any other remedy whatsoever, which he or they might have had if this act had not been passed, by reason or on account of the neglect, default, incompetency, or incapacity of any pilot duly acting in the charge of any ship or vessel, under or in pursuance of any of the provisions of this act, or by reason or on account of no pilot, or of no duly qualified pilot being on board of any such ship or vessel, unless it shall be proved that the want of a pilot, or of a duly qualified pilot, shall have arisen from any

(*p*) 6 Geo. 4, c. 125, s. 53.

(*r*) Sect. 55.

(*q*) Sect. 54.

refusal to take a pilot, or a duly qualified pilot on board, or from the wilful neglect of the master of such ship or vessel in not heaving to, or using all practicable means consistently with the safety of such ship or vessel, for the purpose of taking on board any pilot who shall be ready and offer to take charge of such ship or vessel" (s).

It also provided, that no pilot licensed under the act, who shall have executed the bond therein directed, and shall be piloting within the limits specified in his license any ship which he shall be duly qualified to pilot, or be piloting in the absence of a duly qualified pilot, shall be answerable in damages to the party aggrieved beyond the amount of the penalty specified in the bond, and the pilotage payable to him in respect of the voyage on which the ship shall be, for any loss or damage happening by his neglect or want of skill (t).

8 The Court of Common Pleas decided, in two cases which came before it, on the construction of the 30th section of the old act (u), that the owners of ships placed under the control of pilots, in pursuance of that act, were not answerable for damage done to other vessels by collision on the river *Thames* (v); it having been contended, in one of those cases, that the exemption was confined to injuries to the cargo of the ship under the control of the pilot. Lord *Stowell*, in a prior case, not quoted or noticed in either of those two cases, held, that the owners were responsible for damage occasioned "by the mismanagement of their ship, though it was under the care of a regular pilot, under whose directions the master was acting" (w). The act of Parliament is not referred to in the case, but it can hardly have been unknown to that very learned judge.

It should be observed, that the 55th and 56th sections of the last act mention the neglect, &c. of a pilot "duly acting in the charge of a ship, under or in pursuance of any of the provisions of that act." The words of the 30th section of the 52 Geo. 3, c. 39, are, "a pilot taken on board of." It may be doubtful whether, for the purpose of the question, that is now to be mentioned: this difference of expression may be material. The ques-

(s) 6 Geo. 4, c. 125, s. 56.

(t) Sect. 57.

(u) 52 Geo. 3, c. 39.

(v) *Bennet v. Moita*, 7 Taunt. 258;

Ritchie v. Bousfield, id. 309.

(w) *The Neptune the Second*, 1 Dods. Ad. Rep. 467.

tion is, whether a ship is to be considered as under the management of the owners, or of their servants, while she is in the charge of a local pilot, duly licensed or appointed under the authority of any other act of Parliament than this of the 6 Geo. 4, as of a *Hull*, *Liverpool*, or *Newcastle* pilot. Two cases have been decided with respect to a *Liverpool* pilot, not easily reconcilable with each other in all that was said by the learned judges. One of these, in the Court of King's Bench (*x*), was argued and determined in the interval between the argument and judgment of the other, in the Court of Exchequer (*y*).

It may be inferred, from the two cases considered together, that where the master is bound by an act of Parliament, under a penalty, to place his ship in the charge of a pilot, and does so accordingly, the ship is not to be considered as under the management of the owners, or their servants; but when it is in the election or discretion of the master to take a pilot or not, and he thinks fit to take one, the pilot so taken is to be considered as a servant of the owners. Under what circumstances the master is thus bound to place his vessel under the charge of a local pilot, must depend upon the provisions of the local act, by which the duty of taking a pilot is imposed upon the master. In the case of *Carruthers v. Sydebotham*, above cited, Lord *Ellenborough* was of opinion, that if the master cannot navigate without a pilot, except under a penalty, he is under the compulsion of the law to take one, and is not answerable for the misconduct or awkwardness of a person whose appointment is thus taken out of his hands. This has also recently been decided on the *Newcastle* Act; in the case of the *Maria*, a foreign vessel, by the present learned judge of the Court of Admiralty (*z*).

(*x*) *Carruthers v. Sydebotham*, 4 M. & S. 77.

(*y*) *Attorney-General v. Case and Others*, 3 Price, 302.

§ (*z*) It was a cause of collision, in which the *Maria*, a foreign vessel, and the *Websters*, a British vessel, were both proceeding up the Tyne to Newcastle, the former being towed by a steamer, the latter by its own boat with two hands. The owners of the *Maria* denied that the collision was attributable to their vessel, but alleged, as a defence in law, that it was in charge of a duly licensed pilot, taken

on board in pursuance of the *Hull* and *Newcastle* Pilot Act, by which a foreign vessel proceeding up the Tyne, was obliged and required to take such pilot on board, or on refusal, to pay the full amount of the pilotage. The learned Judge, Dr. Lushington, took time to look into the act, and into the cases cited, and now delivered his opinion.

He began by expressing his satisfaction at having taken time to deliberate upon the case, because it had compelled him to enter upon a full investigation of the question, and had enabled him to throw

9. § By the 87th section of the 6 Geo. 4, c. 125, it is expressly provided, that nothing in the act contained shall extend to affect or impair the jurisdiction of the High Court of Admiralty; and it

more light upon it than it had hitherto received. The defence was twofold; first, that the *Maria* had a pilot aboard, which raised a question of law; secondly, that the accident was occasioned solely by another vessel, the *Grafton*, coming down the river, which struck the *Websters* on the larboard side, driving her towards the *Maria*, so that the *Maria* struck her on her starboard side, and caused the damage, which was a question of fact. He thought it expedient first to dispose of the question of law. The first point was, whether the *Maria*, supposing that otherwise the responsibility of the collision would fall upon her, could successfully plead in exoneration that she had a pilot on board? if so, a second question would arise, whether the collision was caused by the error or want of skill of the pilot? The *Maria* was a foreign vessel, proceeding up the Tyne to Newcastle, having a pilot on board, duly appointed by the corporation of the Trinity House of Newcastle. The principle upon which the Legislature must have proceeded in exonerating the owners of a vessel doing damage from responsibility is, that they are compellable by law to take a pilot on board, and therefore, ought not to be made liable for the default of a person forced upon them, and over whom they had no control. This rule was founded in justice and equity, and the doctrine had been acknowledged in the case of *The Attorney-General v. Case*, 3 Price. In that case, the vessel doing the damage was at anchor in the Mersey, with a pilot on board, under the Liverpool Pilot Act; she dragged her anchor, and fell foul of his Majesty's ship *Bittern*. It was determined by the Court of Exchequer, that the then existing Pilot Act, 52 Geo. 3, c. 39, had no general operation over all pilots throughout the kingdom, but was confined, unless particularly expressed, to the pilots enumerated in the act itself; and that, therefore, it did not extend generally to pilots licensed under

the Liverpool Act; that the question, whether the taking a pilot was compulsory, must depend, therefore, on the Liverpool Act alone, and that act did not render it compulsory on the master to take a pilot; it was wholly optional; there was no penalty if no pilot was taken. There was a confusion, and apparently a mistake, in the report of the judgment of Chief Baron Thomson in that case; it was not decided that a clause requiring a pilot to be taken on board, or the pilotage to be paid, was not compulsory. A similar question occurred before the Court of Queen's Bench in the case of *Carruthers v. Sydebotham*, 4 M. & S. 77, upon a policy of assurance, whether the assured could recover for damage done to a ship through the Liverpool pilot taken on board to conduct her up the river, improperly fastening her at the pier of the dock basin. This case was decided, in the interval between the argument and judgment, in *The Attorney-General v. Case*, and the question was the same, though raised in a different shape; the assured would be entitled to recover only if it was compulsory on the master to take a pilot. It was decided, in conflict with the decision of the Court of Exchequer, that the General Pilot Act did operate on the Liverpool Act in this particular; and that, by virtue of such general act, the taking a pilot was compulsory. Was it necessary for this Court to decide between these conflicting decisions of such high authorities? The 55th section of the existing General Pilot Act, 6 Geo. 4, exempted masters or owners from liability, where the vessel had a pilot on board acting in charge of her in pursuance of that act. The question then, seemed to be this, was the pilot on board the *Maria* acting in charge of her under the provisions of the statute of 6 Geo. 4? He (the learned Judge) doubted whether he could, in the present case, apply the 55th section of the 6 Geo. 4, to a Newcastle pilot; but it was not necessary to decide this point, as

has recently been decided by Sir *John Nicholl*, in conformity with the judgment of Lord *Stowell*, in the case of the *Neptune*, that the act only exonerates masters and owners from personal responsibility, leaving the remedy *in rem.*, (at all events against foreign ships)

he would proceed to show. There was an important difference between the two cases of *The Attorney-General v. Case*, and of *Carruthers v. Sydebotham*. In the former, the vessel was at anchor; in the latter, the vessel was proceeding up the river, homeward bound, and in such a case, the master was bound, "compellable," as Mr. Justice Le Blanc expressed it, to take a pilot; if he refused, he was liable to pay the pilotage. In the one case, the taking a pilot was optional; in the other, in case of refusal, the master was liable to pay the pilotage, which he (the learned Judge) held, with Mr. Justice Le Blanc, to be compulsion. He hoped he made it clear that there was a broad distinction between these two cases; but he was sorry to say that the further one examined the subject, the more points of difficulty were to be grappled with. It might be said, that admitting the distinction, did it follow that the owners of the vessel, compelled to take a pilot under the Liverpool Act, would be exonerated unless the 56th section of 6 Geo. 4 applied, and gave indemnity? In other words, the proposition was this, supposing the taking a pilot on board to be compulsory, did it require the authority of an act of Parliament to indemnify the owners from responsibility for damage done through the default of the pilot; or, on principle, independent of acts of Parliament, would not the owners be exempted from all liability for loss occasioned by the misconduct of a person forced upon them? This was a great question, depending upon the general principles of reason and justice, and he (the learned Judge) was of opinion that, independently of the express provisions of the statute, the compulsory taking of a pilot did, on general principles, release the person so taking him under compulsion from all responsibility for his acts; and he said this not without authority, for the expression of Mr. Justice Le Blanc, "inde-

pendently of the general principle," implied that he recognized that general principle, which was recognized by common sense and justice throughout the world. Supposing, then, that the General Pilot Act did not apply, he (the learned Judge) thought the general principle alone sufficient to exonerate the owners. What was the general principle on which one man is responsible for the acts of another? He is answerable for injury done to another within the scope of his employment because he elects him, and the act is voluntary. But where a man is compelled to employ another, the whole principle in which liability depends, entirely fails. The result of these two important cases, leaving out of consideration the question of the general operation of the Pilot Act, was this, that both cases were rightly decided; in one, the taking a pilot was not compulsory; in the other, it was. Applying the principle he had laid down to the present case, the question was, whether it was compulsory on the master of the *Maria* to take a pilot? Now, the *Maria* was a foreign vessel, and he was most clearly of opinion, that under the 6th section of the Newcastle Act, which "obliged and required masters of foreign vessels to take pilots," it was compulsory upon the master to take a pilot. If it had enacted simply that a pilot should be taken, without providing that, in case of omission, the pilotage should be paid, the master would have been indictable for a misdemeanor; but, assuming that all criminal proceeding is done away with by the clause requiring the pilotage to be paid, was it less compulsory? In *Carruthers v. Sydebotham*, much weaker words than appear in the Newcastle Act were considered compulsory. In the Liverpool Act, there are no such words as "obliged and required;" but simply, that if no pilot is taken, the pilotage shall be paid. But the enactment of payment of pilotage is compulsion too. Suppose it had en-

unimpaired (a). Doubts have also been expressed by the same learned judge, whether the masters or owners of foreign vessels doing damage, are entitled to make the same defence under these statutes, that *British* subjects might make *inter se*, and whether or not they would furnish a good defence to an action at law, brought against a foreign master, he was of opinion that no such defence could be sustained in a court proceeding *in rem.*, and governed by the rules of international law. (b)

The Court of King's Bench, in a recent case on the present pilot act, held that the removal of a vessel, which had stopped *short of the end of her voyage* at the *London Docks*, to her original destination, higher up the river, was not a mere change of mooring under the 63d section of the act; that the master was bound to take a pilot on board, and having done so, that the owners were not answerable for an injury done to another vessel (c), while their vessel was under his management and control. §

Under the 52 Geo. 3, it was held, that an action for a penalty could be brought only in the county wherein an offence in the river *Thames* occurred (d). This would, in many instances, be very difficult, and in some perhaps, impracticable; and the inconvenience has been remedied by the last act (e), which authorizes the action to be brought either in such county or in *Middlesex* or *London*.

acted the payment of ten times the pilotage, the difference would have been in the degree of compulsion merely. He had, therefore, no hesitation in saying, that the pilot was taken on board the *Maria* by compulsion, and, being so, the owners were not responsible for his acts. The learned Judge then examined the facts, and expressed his opinion that the fault of the collision, if imputable to the *Maria*, was the fault of the pilot who had charge of the vessel; it would be a dangerous doctrine to hold, that save under most extraordinary and peculiar circumstances, the master would be justified in interfering with the pilot in his proper vocation. He thought the opinion he had formed on this case was founded upon the general principles of reason and justice—namely, to charge no man with the acts of another who is not an agent of his own selection; and in the case of a fo-

reign vessel, it would be revolting to all sense of equity, to say to the owners, "You shall take a pilot of our selection, be he negligent or careful, drunk or sober, skilful or ignorant, and you shall be responsible for his conduct, unless you pay the penalty, for penalty it was, of pilotage for no service or advantage whatever." He dismissed the owner of the *Maria*, but without costs.—November 13, 1839. §

(a) Case of the *Girolamo*, Guirnovich, 3 Hag. 169; also the *Carl Johan*, 3 Hag. 186.

(b) The *Girolamo*, 3 Hag. 169; Baron Holberg, 3 Hag. 244; but see the *Christiana*, Larsen, 2 Hag. 183.

(c) *M'Intosh v. Slade*, 6 B. & C. 657.

(d) *Barber (qui tam) v. Tilson*, 3 M. & S. 429.

(e) Sect. 86.

CHAPTER VIII.

OF THE CONVEYANCE OF PASSENGERS IN MERCHANT SHIPS.

§ THE increasing intercourse between the United Kingdom and distant countries, and the extent to which emigration has of late years been carried (*a*), suggest the propriety of adverting to that branch of the law of merchant ships and seamen which relates to the conveyance of passengers. It will be convenient to consider the matters connected with this subject under two heads. First, The rights and duties of the master and passengers; and, secondly, the regulations which the legislature has established in relation to them.

1. First. The grave responsibility of the person to whose skill and conduct life and property are entrusted on the ocean, and the situations of unforeseen emergency in which he may be compelled to exert himself for their preservation, render it necessary that he should be invested with large, and, for a time at least, unfettered authority. Obedience to this authority, in all matters within its scope, is a duty which should be cheerfully discharged by every passenger on board the ship. Whatever is necessary for the security of the vessel, the discipline of the crew, the safety of all on board, the master may lawfully require, not only of the ship's company, who have expressly contracted to obey him, but of those also whom he has engaged to carry to their destination, on the implied condition of their submission to his rule (*b*). The exercise of power thus undefined must, at his peril, be restricted to the necessity of the case; and, on the ground of such necessity, and within its limits, he may enforce and justify orders,

(*a*) The number of emigrants from the United Kingdom to the British possessions in North America, the United States, the Cape of Good Hope, and

Australia, in the years 1833, 1834, 1835, was 183,237.

(*b*) *Boyce v. Bayliffe*, 1 Campb. 58.

which would otherwise expose him to censure, to civil responsibility, and to punishment.

A passenger who is found on board in time of danger, is bound, at the master's call, to do works of necessity in defence of the ship, if attacked, and for the preservation of the lives of all on board (*b*). Yet, as he may lawfully, except under peculiar circumstances, depart the ship,—should he voluntarily remain, at the risk of his personal safety, to assist her in her distress, he may be entitled to remuneration for his service (*c*). In an action of assault and false imprisonment on board an *East Indiaman*, in a voyage from *Bombay* to *Calcutta*, it appeared that the plaintiff was a passenger in the gunner's mess, and that the defendant was captain of the ship. Near the *Cape of Good Hope*, two strange sail were descried in the offing, supposed to be enemies. The defendant immediately mustered all hands on deck, and assigned to every one his station. The plaintiff, with the other passengers, he ordered on the poop, where they were to fight with small arms. This order all readily obeyed, except the plaintiff, who, conceiving he had been ill-used by the defendant some time before, in being forbidden to walk on the poop, positively refused to go there, but offered to fight in any other part of the ship with his messmates. The defendant, for this contumacy, ordered him to be carried upon the poop, and there kept him in irons during the whole night. Next morning, no enemy appeared, and the ship arrived safe at *St. Helena*, where the plaintiff quitted her. Lord *Ellenborough* at first said, that he did not know that the confinement of the plaintiff was not necessary, and therefore justifiable; but when it came out that he had been kept all night in irons on the poop, he clearly held that the defendant had exceeded the limits of his authority (*d*). In all such cases, the propriety of the conduct which is questioned, will be most satisfactorily determined, and redress most readily obtained, by appeal to a jury, a mode of trial which has long fallen into disuse in the Court of Admiralty, which, however, continues to assert its jurisdiction in these as in all other complaints of damage on the high seas (*e*).

(*b*) *Newman v. Walters*, 3 Bos. & Pull. 612.

(*c*) *Ibid.*, and see the *Two Friends*, 1 Rob. Ad. Rep. 285; the *Beaver*, 3 Rob.

Ad. Rep. 292; the *Joseph*, Hurray, 1 Rob. Ad. Rep. 306.

(*d*) *Boyce v. Bayliffe*, 1 Campb. 58.

(*e*) See the case of the *Ruckers*, 4

2. In the case of 'an express contract, the rights of the parties will of course be governed by its terms, and the usage of particular trades and voyages may often influence their interpretation. Where the contract is not express, it may also be evidenced by such usage. A few miscellaneous cases on this subject may properly be noticed here.

In the case of *Corbin v. Leader* (*f*), the defendant, the master of an *East Indiaman* about to sail from *Calcutta*, on a voyage to *London*, by an agreement under seal, granted and let to the plaintiff, the whole of the cabins and accommodations fitted up for the reception, convenience and conveyance of passengers on board the ship, and the defendant covenanted to promote as far as in him lay, the comfort and convenience of the plaintiff and such persons as he should engage and contract with, and who should be received as passengers in and on board the said ship, in consideration whereof, the plaintiff covenanted with the defendant, among other things to pay the defendant the sum therein agreed on; and that he would in every respect support and uphold the authority and command of the defendant, and in no way interfere with the management or navigation of the ship, or with the affairs thereof. The plaintiff further covenanted that if in the progress of the voyage, it should be necessary for the convenience and at the request of the plaintiff, to touch or put into any other intermediate port or ports, save and except *St. Helena*, he would bear and pay all port and other necessary charges which might be incurred thereby. The Court held that this stipulation as to the payment of the charges of touching at an intermediate port, thus interwoven with the covenant of the defendant, clearly showed that stopping in the course of the voyage, was a thing contemplated by the parties as conducive to the convenience of the passengers, and that the defendant was bound so to stop at the request of the plaintiff, unless it would have interfered with the safety of the vessel.

In an action of *assumpsit* by the master of an *East Indiaman*, against a Lieutenant in the Company's service, who had been his passenger on a voyage from *Madras* to *London*, it appeared

Rob. Ad. Rep. 73. It appears from the Black Book of the Admiralty, that jurors were formerly summoned to the Admiralty Sessions. "Si un homme est endite qu'il a batu une personne ou qu'il est un com-

mun bateur et malfaiseur en eau salée en cel cas s'il est convict par 12 il sera emprisonne par 21 jours et plus il sera fin au Roy."—Bl. B. Admiralty, art 12.

(*f*) 10 Bing. 275.

that by an order of the Court of Directors, officers of that rank were to pay 1000 rupees and no more for "their passage, and accommodation at the captain's table," and this sum was paid into Court. For the plaintiff, it was contended that the defendant, for the regulation price, was only entitled to swing his cot in the steerage, and that he had been allowed a cabin to himself for which the additional payment was required. Evidence having been given that during the voyage no officers slept in the steerage, and that the defendant's cabin would have remained empty had he not occupied it, Lord *Ellenborough* was of opinion that there was nothing to raise an implied promise to pay more than the regular sum (g).

The case of *Gillan v. Simpkin*, was an action for money had and received, to recover passage money paid to the defendant, as master of a ship, in which he had agreed to carry the plaintiff as a passenger to *Antigua*. The plaintiff, who had paid the money before the commencement of the voyage, had intended to have gone on board at *Portsmouth*, but the luggage was shipped in the river *Thames*, and in proceeding round from thence to *Portsmouth*, the ship was lost. It appeared in evidence that it is usual for the passage money to be paid in *London*, and that the stores for the use of the passengers were always put on board in the river. Chief Justice *Gibbs*, in his direction to the jury said, "If the money had been to be paid at the end of the voyage, the defendant could not have recovered any part of it, there being an entire contract to carry the plaintiff from *London* to *Antigua*. But if the voyage was commenced, and the ship was prevented from completing it by perils of navigation, the captain may be entitled to retain the passage money previously paid to him. The contract for this purpose may either be express or may be evidenced by established usage. Here it is proved that in *West India* voyages the passage money is paid before the voyage commences, and it does not appear to be returned, although the voyage is defeated. On the other hand, if the ship were lost before the commencement of the voyage, for which these parties had contracted, the money paid by anticipation must be returned" (h).

In a recent case, the master of a vessel sought to recover damages from the defendant for the breach of a verbal agreement, by which

(g) *Adderley v. Cookson*, 2 Campb. 15.

(h) 4 Campb. 241, and see *Leman v. Gordon*, 8 Car. & P. 392.

he engaged two cabins on a voyage from *England* to *Madras* for a certain price. He refused to go, because the vessel, which was to have left the docks by the 10th of October, did not. It was proved to be the rule of the *East India* trade, that when a passenger refused to go, in consequence of a delay in the sailing of a vessel, he was to forfeit half the amount of the passage money agreed for. The ship did not leave the docks until the 21st of October. "Chief Justice *Tindal* directed the jury to find for the plaintiff with half the passage money as damages, if they thought that the time of sailing was matter of representation, but not an essential part of the contract, and that under the circumstances, the ship had sailed within a reasonable time" (i).

In an earlier case, in which the plaintiff sought to recover passage money on an implied assumpsit *pro ratâ itineris peracti*, it appeared that he had contracted to carry the defendant, his family and luggage from *Demerara* to *Flushing*, and that in the course of the voyage and within four days' sail of *Flushing*, the ship was captured by an English ship of war, and brought to *England*. The ship and cargo were libelled in the Court of Admiralty, and proceedings were pending against the ship, but the defendant and his family were liberated, and his luggage restored to his possession. The Court was of opinion that if the ship had been restored, the action might have been maintained, but that as the result of the proceedings in the Court of Admiralty might be the condemnation of the ship, and decree of her freight to the captors, it was premature while that suit was pending (k).

The executors of an *East India* captain, who had died in the *East Indies*, before the commencement of the homeward voyage, brought an action against the chief mate of his ship, on whom the command had devolved, to recover the amount of the sum he had received from the passengers brought home in the ship, for their passage and entertainment during the voyage. It was contended for the plaintiff, that the passage money must belong to the representatives of the captain; for the defendant, that he was entitled to the whole, because he had the actual command during the voyage. "If," said Mr. Justice *Bayley*, "there be no usage on the subject, I think the law is, that where the captain has contracted to carry passengers and dies, his representatives are entitled to the benefit of the contract, and may maintain an action for the pas-

(i) *Yates v. Duff*, 5 Car. & P. 569.

(k) *Mulloy v. Becker*, 5 East, 316.

sage money. If the mate lays out money in purchasing stores for such passengers, he is the agent of the representatives for that purpose, and may oblige them to repay him. But where, after the death of the captain, the mate contracts to carry passengers on the homeward voyage, he is himself entitled to the benefit of the contract, and may retain the whole of the passage money. If for the entertainment of such passengers he has any part of the stores laid in by the captain, for so much he must account to the captain's representatives" (k.)

In an action against a captain of a ship for not furnishing good and fresh provisions to a passenger on a voyage, Lord *Denman* said, in his address to the jury, "I think the result of the evidence is, that the captain did not supply so large a quantity of good and fresh provisions as is usual under such circumstances. But there is no real ground of complaint, no right of action, unless the plaintiff has really been a sufferer; for it is not because a man does not get so good a dinner as he might have had, that he is therefore to have a right of action against the captain, who does not provide all that he ought; you must be satisfied that there was a real grievance sustained by the plaintiff" (l).

An action was brought by a captain in the army against the captain of the ship *Bolton*, to recover damages for the breach of a contract, by which he undertook to convey the plaintiff as a cuddy passenger on a voyage from *Madras* to *London*. The plaintiff complained, among other things, that the defendant did not treat him as a cuddy passenger, but excluded him from the cuddy, and from walking on the weather side of the ship. The defence was, that the conduct of the plaintiff was vulgar, offensive, indecorous and unbecoming, and that he had threatened to cane the defendant. Upon these grounds of defence Chief Justice *Tindal*, observed, "There is some evidence that the plaintiff was in the habit of reaching across other passengers, and of taking potatoes and broiled bones with his fingers. It would be difficult to say if it rested here, in what degree want of polish would, in point of law, warrant a captain in excluding a passenger from the cuddy—conduct unbecoming a gentleman, in the strict sense of the word, might justify him, but in this case, there is no imputation of the want of gentlemanly principle. With respect to the

(k) *Siordet v. Brodie*, 3 Campb. 263.

(l) *Young v. Fewson*, 8 Car. & P. 56.

threat used by the plaintiff, 'that he would cane the defendant,' it is important to consider whether it was heard by the defendant, before he gave the order for the exclusion of the plaintiff from the cuddy. If it did operate on the mind of the defendant at the time of the exclusion, I cannot conceive that such conduct would not justify that exclusion. A man who has threatened the commanding officer of the ship with personal violence would not be a fit person to remain at the table at which he presided" (*m*).

It has been expressly decided that the master of a ship has a lien on the luggage of a passenger for his passage money, but not on the clothes which he is wearing, when about to leave the vessel (*n*).

3. Secondly, Breaches of contract and injuries like to those complained of, in the cases which have been cited, the common law of personal actions was found adequate to repress. Experience, however, proved, that the ignorance and the credulity of indigent persons requiring cheap modes of conveyance, and seeking new fortunes beyond the seas, often placed them at the mercy of men, who, familiar with the dangers of navigation, were willing to brave all risks in the prospect of gain, and the Legislature has by various statutes applicable to different trades and voyages, interposed to protect unwary emigrants, from the fraud and cupidity of unprincipled shipowners. Security for the sea-worthiness of the ship,—a due proportion between her tonnage and the number of her passengers,—the preservation of their health during the voyage,—and an adequate supply of water and provisions for their use, were the principal objects to be attained, and these it was not found easy to reconcile, with a due consideration for the important interests which it had become necessary to regulate, and {the small ability of those for whom protection was required. It has been proved, unhappily, by the continued recurrence of disasters (*o*), appalling to humanity, and too surely traced to evils

(*m*) *Prondorgast v. Compton*, 8 Car. & P. 454. The report acts out in a special plea the acts of misbehaviour imputed to the plaintiff.

(*n*) *Woolf v. Summers*, 2 Camp 631.

§ (*o*) During 1834, no fewer than seventeen ships, with passengers on board, bound for Quebec, were wrecked on the passage, seven hundred and thirty-one emi-

grants losing their lives in consequence, while many more lost most part of their property, and were reduced to the greatest distress. Emigrants to Quebec are mostly taken out in ships engaged in the timber trade, and it is well known, that speaking generally, these are a very inferior class, it being the usual practice to turn worn out ships unfit to carry dry cargoes

which legislation might remove, that if much good has been effected by the enactments which we are about to consider, much yet remains to be done.

In the reign of Geo. 3, an act (*p*) was passed, which, after reciting that in various parts of the *United Kingdom* several persons had been seduced to leave their native country under false representations, and had suffered great hardships on shipboard for want of water and provisions, and other necessities, and of proper accommodation on their passage,—proceeded to establish general regulations for the carriage of passengers to foreign parts. Other provisions were made in the same reign for regulating the carriage of passengers to and from the *United Kingdom* to *Newfoundland* and the coast of *Labrador* (*q*), the *United States* (*r*), and the *British* colonies in *North America* (*s*) ; and these enactments may be considered the ground-work of subsequent legislation on this subject.

All these statutes were repealed by the 4 Geo. 4, c. 84, “for regulating the carriage of passengers from the *United Kingdom* to foreign parts ;” and this act having also about two years afterwards been repealed by the act for the consolidation and amendment of the laws relating to the customs, the 6 Geo. 4, c. 116, “for regulating vessels carrying passengers to foreign parts,” was passed.

By the 9 Geo. 4, c. 21, further provisions were introduced to regulate the carriage of passengers from the *United Kingdom* to the continent and islands of *North America* ; but this act has also been repealed by a recent and more general statute, 5 & 6 Wm. 4, c. 55, for regulating the carriage of passengers from the *United Kingdom*,” which is now the law upon this important subject. It will be found in the Appendix.

By this act, which applies to all ships carrying passengers from any port or place in the *United Kingdom*, or the islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, on any voyage for any port or place out of *Europe*, and not being within the *Mediterranean Seas*, it is enacted, “That no ship shall proceed on her voyage

into this department. Most part of the catastrophes alluded to may, we are assured, be ascribed to this circumstance, and to the misconduct of the master and crews.—Macculloch, Dictionary of Com-

merce, Suppl. tit. Emigrants. §

(*p*) 43 Geo. 3, c. 56.

(*q*) 53 Geo. 3, c. 36 ; 56 Geo. 3, c. 83.

(*r*) 56 Geo. 3, c. 114.

(*s*) 57 Geo. 3, c. 10.

with more persons' on board than in the proportion of three persons for every five tons of her registered burthen, the master and crew being included in and forming part of such prescribed number; that no ship having more than one deck shall carry any passengers upon any such voyage, unless she shall be of the height of five feet and a half at the least between decks; that no ship having only one deck shall carry any passengers upon any such voyage, unless a platform be laid beneath such deck, in such a manner as to afford a space of the height of at least five feet and a half, and that no such ship shall have more than two tiers of berths; that no such ship having two tiers of berths shall carry any passengers on any such voyage, unless there shall be an interval of six inches at the least between the deck or platform and the floor of the lower tier, throughout the whole extent thereof; provided that whatever may be the tonnage of the ship, no greater number of persons as passengers shall be taken on board, than shall be after the rate of one such person for every ten superficial feet of the lower deck or platform unoccupied by goods or stores not being the personal luggage of such persons, if such ship shall not have to pass the line on her voyage, or after the rate of one such person for every fifteen such clear superficial feet, if such ship shall have to pass the line" (t).

No ship carrying passengers shall be cleared out for any such voyage, unless there shall be actually laden and on board such ship, good and wholesome provisions for the use and consumption of the said passengers, over and above the victualling of the crew, to the amount, and in the proportion following, viz., a supply of pure water to the amount of five gallons to every week of the computed voyage for every passenger on board, in tanks or sweet casks, and a supply of bread, biscuit, oatmeal, or bread stuffs, to the amount of seven pounds weight to every week of the computed voyage of every such passenger; provided that to the extent of one-third of such supply and no more, seven pounds' weight of potatoes may be computed to be equivalent to one pound of bread, biscuit, oatmeal, or bread stuffs, in the supply of any ship bound to *North America*; and that where any ship shall be directed to call at a port or place in the course of her voyage, for the purpose of filling up her water, a supply of water

(t) 57 Geo. 3, s. 2.

at the rate before mentioned for every week of the computed voyage, to such port or place of calling, shall be deemed to be a compliance with the provisions of this act" (u).

"The number of weeks deemed to be necessary for the voyage of any such ship according to her destination, shall be determined by the following rule of computation :—For a voyage to *North America*, ten weeks; for a voyage to *South America*, on the *Atlantic Ocean*, or to the west coast of *Africa*, twelve weeks; for a voyage to the *Cape of Good Hope*, fifteen weeks; for a voyage to the *Mauritius*, eighteen weeks; for any other voyage, twenty-four weeks" (v).

The officers of the customs shall examine the provisions and water before the departure of the vessel (w). If doubts shall arise whether any ship about to proceed on such voyage with passengers, is sea-worthy so as to be fit for her intended voyage, and such doubts shall not be removed to the satisfaction of the collector and comptroller of the customs, at the port from which such vessel is to be cleared out, it shall be lawful for them to cause such ship to be surveyed by two competent persons, and if it be reported by those persons, that such ship is not in their opinion sea-worthy with reference to such voyage, such ship shall not be cleared out, unless the contents of such report be disproved to the satisfaction of the commissioners of the customs, or until such ship shall have been rendered sea-worthy (x). A table is to be drawn up of the prices of provisions to be sold on board, of which a copy is to be affixed in some convenient and conspicuous place on board the ship, and no higher prices are to be charged than are stated in such table. The master is not, however, required to provide provisions for the purpose of sale to any passengers who may have contracted to victual themselves during the voyage (y). Two copies or abstracts of the act issued by authority of the commissioners of the customs, and authenticated by the collector or comptroller of the customs, at the port of clearance, are to be delivered to the master and kept on board, one of which shall upon request made at reasonable times to the master, be produced to any passenger for his perusal (z). A medical practitioner duly authorized to practise in this kingdom as a phy-

(u) 57 Geo. 3, s. 3.

(v) Sect. 4.

(w) Sect. 5.

(x) Sect. 7.

(y) Sect. 6.

(z) Sect. 8.

sician, surgeon or 'apothecary, with a proper supply of medicines and instruments certified by two medical practitioners to be suitable for the intended voyage, shall sail with every ship carrying one hundred passengers to any such port or place, except any port or place in *North America* (a). The master must deliver a list of passengers to the collectors of customs at the port of clearance, and shall receive from him a counterpart to be exhibited to the chief officer of customs at the port of landing (b), and he shall not land any passenger at a place not contracted for (c).

If any ship shall not actually put to sea, and proceed on the intended voyage on the day appointed in any contract with the owner, master, or charterer, or their agent, with any passenger who shall on that day be on board the same, or ready to proceed on such intended voyage, the master shall pay to every passenger who shall have contracted to victual himself, a fine of one shilling in respect of every day, during which he shall be so detained, previously to the actual clearing out, and final departure of such ship on such voyage, to be recovered daily, and the master of such ship shall victual each and every such passenger as shall have contracted to be victualled by the shipowner on and from that day, which shall be so appointed, unless the vessel be detained by stress of weather, or other unavoidable cause.

Penalties for the non-compliance with all these regulations are imposed upon the master (d), and for the more effectually securing their observance, he is further required, before he clears out for any port out of *Europe*, not being in the *Mediterranean* seas, to enter into a bond with one sufficient surety, to be approved of by the chief officer of customs at his port of clearance in the sum of 1000*l.* conditioned for his due performance of them.

By the 1 & 2 Vict. c. 113, s. 26, all the provisions, regulations, penalties and forfeitures of the 5 & 6 Wm. 4, c. 53, are extended to foreign vessels carrying passengers from any port or place in the *United Kingdom*, and from the Islands of *Guernsey*, *Jersey*, *Alderney*, *Sark*, or *Man*, on voyages to or for any port or place out of *Europe*, and not being within the *Mediterranean* sea.

The act, of which an abstract has been given, expressly excepts from its operation all ships in which the number of passengers

(a) 57 Geo. 3, s. 9.

(b) Sect. 11.

(c) Sect. 12.

(d) Sect. 16.

shall not exceed one for every five tons of their registered burthens (*e*). It is provided also, that nothing therein contained shall take away or abridge any right of action which may accrue to a passenger, in respect of the breach or non-performance of any contract entered into between him and the master and owners (*f*).

By the 4 Geo. 4, c. 88, the carriage of passengers between Great Britain and Ireland is regulated. It will be found in the Appendix. §

(*e*) Sect. 20.

(*f*) Sect. 17.

PART III.

CHAPTER I.

OF COLLISION.

1. § THE master is bound to his owners for the exercise of reasonable skill and care in the management of the vessel, and he and they are bound in like manner to every one who is affected by his acts, within the scope of his employment. The property of the merchant in particular is entrusted to his care, and he and his owners must answer for its damage or loss, through his negligence or misconduct (*a*). Mindful of this responsibility, he must, during the whole course of the voyage, at sea, at anchor, and in port, perhaps even when a licensed pilot is on board (*b*), be vigilant to avoid the peril of collision with another vessel.

This misfortune may be occasioned by circumstances beyond

(*a*) *Fletcher v. Braddick*, 2 New Rep. 182; *Fenton v. Dublin Steam Packet Company*, 1 P. & D. 103.

(*b*) The *Girolamo*, an Austrian vessel, left the London Docks, with a licensed pilot on board, towed by a steam vessel. After she had passed Blackwall, a fog came on, during which she ran foul of the *Edward*, a British* convict vessel, moored below Woolwich, in the proper berth for such vessels.

Sir John Nicholl said, "Did the accident arise from the neglect, default, incompetency, or incapacity (6 Geo. 4, c. 125, s. 53, 54) of the pilot? or was the master in *pari delicto*? It occurred from the vessel going on in the fog, not from an act of bad steerage, want of knowledge of shoals, or any incapacity as pilot, but from proceeding at all. It seems to

be nearly admitted that if the vessel had set off in this fog, blame would have been imputable to the master; if so, was he not blameable in going on in the fog? Had he not a right to resume his authority? Did he not owe it to his owners, and to other persons, whose property might be damaged by a collision, to insist on bringing the vessel up? Was not the master in duty bound at least to remonstrate with the pilot, and to represent the danger of proceeding? Yet he says in his affidavit, 'he did not in the least interfere.' In this aspect the case is, as far as I am aware, new, and one of too much difficulty to arrive at any hasty decision upon, unless there be no other points upon which the case may be disposed of." 3 Hagg. Ad. Rep. 176.

his control, as by the violence of the wind¹ and the sea; it may be accidental without fault on either side, or it may be caused by the negligence, ignorance, or unskilfulness of one, or both the captains whose vessels came into collision.

By the law of most of the maritime (a) states, differing in this particular from the Roman law, which leaves each party to bear his own loss, the cost of damage resulting from collision, without fault in the persons belonging to either ship is to be divided equally between them. The same rule obtains when both vessels are to blame, and when the blame cannot be detected.

One article of the Ordinance of *Wisbuy* (b), seems to favour the interpretation of this rule of equal division, in the sense of a *pro rata* apportionment of the expense of repairs between the colliding vessels, according to their relative value, and the *Hanseatic* Ordinance provides, that the damage be sustained "*Æquis sortibus juxta arbitrium virorum bonorum*" (c). *Valin*, adverting to this doubt, and citing the laws of *Oleron*, *Kuricke* on the *Hanseatic* Ordinance, *Vinnius* and *Stypmann* as authorities, states the better opinion to be, that the damage should be borne in equal portions, that is, each paying half (d). This also in its terms (e), and according to *Valin's* construction of them, is the provision of the *French* Ordinance. We read, on the other hand, in *Émérigon* (f), that "if the collision has not happened fortuitously, and it is impossible to learn to whose fault it is imputable, then each vessel shall bear a moiety of the damage," thus confining the rule, to cases of inscrutable fault. By the *Code de Commerce* (g), it is expressly limited to doubtful cases, the loss occasioned by collision purely fortuitous, being allowed to rest where it has happened to fall. "If it be proved," says a modern

(a) See post, 445, and the authorities there cited by the author; but see Commentaries on the Law of Scotland, by Bell, vol. 1, p. 582, and Cours de droit Commercial Maritime, by Boulay—Paty, tit. de l'Abordage, vol. 4, p. 492. Both these learned authors appear to think, that in cases of pure accident, the rule of the maritime law and of the civil law is the same.

(b) The 67th.

(c) Jus. Marit. Hanseat, tit. 10, Art. 1. Kuricke ad. dict. tit. p. 220, (Edition

Heineccii, p. 801). The same rule is followed in the Danish, Swedish, Prussian, Lubeck, and Hamburg laws. By the Norwegian code, where one vessel, without necessity, strikes against another, it is liable to fines, which vary in amount according to the nature and locality of the injury done to the suffering vessel.—See Pardessus Collection de Lois Maritimes.

(d) Valin. liv. 3, tit. 7, des Avaries.

(e) Art. 10, 11.

(f) Traite d'Assurance, c. 12, s. 4.

(g) Art. 407.

French writer, "that both vessels are to blame, each party bears his own loss. But if it be impossible to say whose fault has occasioned the collision, an estimate is made of the injury done to both, the amount of which is divided, to be borne by the colliding vessels in equal moieties, and not proportionably to the value of each ship and cargo" (*h*).

3. Our Court of Admiralty, before which misfortunes of this kind, are frequently the subject of discussion, adopts, when both vessels are in fault, the rule of the maritime law, and, accordingly, in the case of the *Woodrop*, *Sims* (*i*), Lord *Stowell* lays it down, that there are four possibilities under which collision may occur. "In the first place it may happen without blame being imputable to either party, as where the loss is occasioned by a storm or any other *vis major*. In that case the misfortune must be borne by the party on whom it happens to light; the other not being responsible to him in any degree. Secondly, a misfortune of this kind may arise, where both parties are to blame, where there has been want of due diligence or of skill on both sides; in such a case, the rule of law is that the loss must be apportioned between them as having been occasioned by the fault of both of them. Thirdly, it may happen by the misconduct of the suffering party only; and then the rule is, that the sufferer must bear his own burthen. Lastly, it may have been the fault of the ship which ran the other down, and in this case the innocent party would be entitled to an entire compensation from the other." This rule of equal division, where both vessels are to blame, has been solemnly recognized by the House of Lords, in a case decided there on appeal from the Judgment of the Court of Session in Scotland (*j*). In that case, the ship *Wells* had been endeavouring to make her way into the *Firth of Forth*, and had come to an anchor in consequence of the state of the weather, in what is termed the *Fairway*, that is, in that part of the *Firth* which is constantly navigated by vessels, at some distance from the island of *Inch-*

(*h*) Pardessus Cours de droit Commercial, de l'Abordage, pl. 652. Boulay —Paty, vol. 4, p. 495.

(*i*) 2 Dodds. Ad. Rep. 83.

(*j*) *Hay v. Le Neve*, 2 Shaw's Scotch Appeal Cases, p. 395. The learned author of the articles on mercantile law,

(*Law Magazine*), questions the existence, in the Court of Admiralty, of the rule of apportionment, in the sense of equal division of the loss. It seems clear, from the address of Lord Gifford in the case cited, that not only he, but Lord Stowell also, so understood it.

Keith. During a very blowing night, whilst she was in this position, the ship *Sprightly* came suddenly upon her, and the *Wells* was run down, and, with her cargo, totally lost.

A proceeding was instituted before the Judge Admiral by the owners of the ship *Wells*, against the owners of the ship *Sprightly*, and interlocutors were pronounced by him, the result of which was, making the owners of the ship *Sprightly* liable to the full extent of the damage of the *Wells* and of her cargo, subject to the limitation of the Act of Parliament, as to the amount of the value of the ship occasioning the loss, and her freight; the Judge Admiral being of opinion, that the fault rested entirely with the *Sprightly*. The cause was removed to the Court of Session, which referred the evidence to the Port Admiral at Leith, who reported, that although fault was imputable to both vessels, he thought the greater blame rested on the ship *Sprightly*. In consequence of this report, the Court of Session, deferring to the authority of the *English* Court of Admiralty in the case above cited, altered the decision of the Judge Admiral; and the question came before the House of Lords, on appeal from the judgment of the Court of Session. Lord *Gifford*, in his address to the House of Lords, states, that he had been furnished by Lord *Stowell* with a note of a case in which he was counsel, and of which the judgment entered up in the Court of Admiralty had been found. It was the case of *the Petersfield v. the Judith Randolph*, decided by Sir *James Marriott*, in 1789. It is as follows: "For further information and sentence, Captain *Hector Rose* and Captain *Henry Hinde Petty*, two of the elder brethren of the Trinity House, again attended as assessors to the judge in this cause, and the judge having heard the proofs read, and advocates and proctors on both sides, and likewise the opinion of the said Trinity brethren, pronounced that both ships were in fault, and that the *Judith Randolph* was most in fault, and decreed that the whole damage sustained by the owners of the ship *Petersfield* and her cargo, which was sunk and lost, as well as the damages and expenses given against the ship *Petersfield*, and the costs of suit here on both sides, be borne equally by the parties in this suit." "I apprehend, therefore," added Lord *Gifford*, "that what is laid down in the case of the *Woodrop, Sims*, is established to be the law of the Court of Admiralty. I have no difficulty in recommending to your Lordships to apply to this case the judgment of Sir *James Marriott* in the case of the

Judith Randolph. 'If your Lordships were to take any other rule, one cannot conceive any mode of properly apportioning the loss which the Court of Session have found to have occurred. It might be extremely difficult to regulate the quantity of neglect on the one side and the other, and to apportion the damages by any other rule. On reviewing the evidence in this case, I was strongly impressed with the negligence on the part of the *Wells*, in not showing a light, as Sir *John Beresford* (the Port Admiral) says she ought to have done, when she saw the *Sprightly* coming down upon her. At the same time, I have no difficulty in saying there was great negligence on the part of the *Sprightly* in not having the look out she ought to have had, considering the place in which she was."

The House determined "that both ships were in fault, and that the whole damage sustained by the ship *Wells* and her cargo, should be borne equally by the parties."

Lord *Denman*, in the recent case of *De Vaux v. Salvador*, (*k*), adverting to the occasional hardship of this principle of apportionment says, "it grows out of an arbitrary provision in the law of nations from views of general expediency, not as dictated by natural justice nor possibly quite consistent with it." Chancellor *Kent* (*l*), also in his Commentaries, speaks after *Cleirac* (*m*) of the rule as *judicium rusticorum*. But there are other principles of maritime law, which could scarcely bear to be tried by this standard of natural justice, the maxim, for instance, which makes wages the offspring of freight, and denies to them the protection of insurance (*n*). The rule, as we

(*k*) 4 Adol. & Ellis, 420. Emerigon, also, in his commentary upon this construction of the article of the French Ordinance, says, "De là il peut très fort arriver que l'entière valeur d'un des navires soit absorbée par la demie du dommage, tandis que l'autre navire beaucoup plus important supportera avec aisance la demie restante."—*Traité des Assurances*, chap. 12, sect. 14.

(*l*) P. 223. Edinburgh edition.

(*m*) Les juriconsultes nomment et qualifient cette décision par moitié *judicium rusticorum*. Elle se pratique ordinairement par les arbitres, arbitrateurs et amiables compositeurs lors et quand l'in-

térieur des parties, ou le motif de la question n'est pas à découvert et connu ou bien quand il y'a de la coulpe de part et d'autre. Tel fut le jugement reconnu tout juridique du sage Roy Salomon qu'il donna sur la question d'entre deux mères, l. 3, Reg. c. 5.—*Cleirac Us et Coutumes de la Mer*, p. 56. Rouen edition, 1671.

(*n*) "The mariner," says Lord Stowell, "goes to sea upon the single security of the freight. Freight is the mother, and the only mother, of wages. If that goes, every thing goes. He has no stepfather, if I may say so, in the character of insurer to supply the loss."—*The Juliana*, 2 Dods Ad. Rep. 510.

have seen, was established and maintained against one, possibly more equitable in its theory but practically more difficult of just application, on the ground of policy. Collision, in the open sea, is comparatively rare, and generally accidental, but in roads and in confined navigations, it is a misfortune of frequent, and seldom of blameless occurrence. "No better means," says *Valin*, "adopting the reasoning of the *Jugemens d'Oleron* (o) of making the masters of small vessels which are liable to be injured by the slightest shock, attentive to avoid collision, than to keep the fear of paying for half the damage constantly before their eyes. And if it be said that it would have been a shorter and more simple mode of adjustment, to let each party bear the loss he had sustained, as arising from *casus fortuitus*, the answer is, that then the masters of large vessels would have made light of collision with those of smaller burthen. Upon the whole, therefore, no rule is so just as that of equal partition" (p).

4. If the master or owner of one of the colliding vessels be unwilling to bear his own loss, and wish to fix it upon the other, he may seek his remedy in the Court of Admiralty or the courts of common law. In both, if he can prove that the master of the defendant's vessel was alone in fault, and that no want of ordinary skill or caution on his own part contributed to the misfortune, he will be entitled to recover a full compensation.

A cause of collision is a suit *in rem*. in the instance Court of Admiralty, commencing with the arrest of the ship, to the mismanagement of which the misfortune is imputed, to recover a summary reparation for the injury alleged to have been sustained. The evidence is taken by written depositions, and the judge determines, on consideration of all the facts of the case, the complainant's right to amends, and the principle of their computation. In this he is usually assisted by two of the masters or elder bre-

(o) Le dommage du coup doit être prisé et party moitié par moitié des deux nef et les vins qui sont dedans, et parter aussi le dommage entre les marchandises; et le maitre de la nef qui a choqué et frappé l'autre est tenu a jurer sur les SS. Evangiles, luy et ses mariniers qu'ils ne choquèrent point de leur grè et volonté. Et la raison pourquoy ce jugement fut fait. Premierem nt qu'une vieille nef ne

se mette point volontiers a la voye d'une meilleure si avant qu'elle endommage ou puisse gréver autre nef. Mais quand elle sçait bien qu'elle y doit parter jusques a la moitié elle se retirera volontiers hors de la voye.—*Jugemens d'Oleron*.

(p) In Holland, the rule is followed, "propter bonum publicum et culpas probandæ difficultatem."—*Neostadii, Decis.* 49.

thren of the Trinity House, who, having heard the evidence read, and the judge's direction on the law, give their opinion, as matter of professional skill, which of the two vessels was to blame, and that opinion is almost always adopted by the court.

By this process, certain rules of the sea, if not positively established, influence and obtain in that court; and each cause is determined on principles, not always consonant to those which would regulate its decision at common law; but, on the whole, perhaps, as consistent with the real justice of the case, and as satisfactory to the litigant parties. Thus, in the case of the *Woodrop*, above cited, Lord *Stowell* told the Trinity Masters, "that the law imposed upon the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel close-hauled (g), and of shewing that it had done so; if not, the owners were responsible for the loss that had ensued. If they thought proper precautions were taken by the persons on board the *Woodrop*, then it would be necessary to inquire whether those measures were counteracted and defeated by improper measures taken by those on board the other ship." Again, in the case of the *Shannon*, a steam-vessel, for damage done by her to the *British Union*, off *Beachy Head*, it appeared that the *British Union* was going up, and the *Shannon* down the *Channel*; that the *Shannon* had seen the *Union* five miles off, but that the *Union* did not see the steam-vessel till just before the collision. For the *Shannon* it was urged, that she was on the starboard tack, and that the rule of navigation is, that when ships are crossing each other in opposite directions, and there is the least doubt of their going clear, the ship on the starboard tack is to persevere in her course, while that on the larboard is to bear up or keep more away from the wind; that if the *British Union* had followed this rule of navigation, the accident could not have happened. To this it was answered, that, admitting the general rule of navigation to be correctly stated, it would not justify a vessel having the power to avoid a collision in standing upon any such privilege, if she foresaw the disastrous consequences of persisting in such a course. The Trinity Masters observed, "that the state of the wind was of no great importance, as the *Shannon*, not receiving her impetus from sails, but from steam, should have been under com-

(g) See also the case of the *Baron Handyside v. Wilson*, 3 Car. & Pay. Holberg, 3 Hag. Ad. Rep. 244, and 528.

mand; that steam-boats, from their greater power, should always give way (*r*); that they were satisfied the *Shannon* had seen the *British Union*, and that the *Shannon* was to blame; and the court decreed accordingly." These cases will suffice to illustrate the manner in which the rules of the sea are recognised and applied in the Court of Admiralty (*s*).

5. In France, usage has established certain rules, which seem to have been adopted by the law, as means of determining, in the absence of positive proof, whether collision be fortuitous or imputable to the master of either vessel. Thus, when two ships are about to enter the same port, the farthest off shall wait until the other has got in; and in case of collision, the one that arrived last shall answer for the damage, unless her master prove that he was not in fault. If two vessels meet, the smaller shall give way. A vessel going out of harbour shall make way for one coming in. When a collision takes place between two vessels, both leaving a port, the one that went out last shall be deemed to have run against the other. The presumption is against the ship which sails during the night, &c. (*t*) Some of these rules seem reasonable in themselves and where established and generally known, they may all be found useful in preventing the evil against which they are intended to guard.

6. By the law of *England*, if both vessels are to blame, each party bears his own loss. If one party can prove that the misfortune was caused by the negligence or want of skill of the other, and that he could not have avoided it by the exercise of ordinary care, he will be entitled to recover a full compensation for the wrong. The established rules of nautical practice as explained by professional men, the usages and regulations of particular ports and rivers, the state of the wind, the tide, and the light, the degree of vigilance of the masters and crew, and all other circumstances bearing upon the conduct and management of both vessels will be considered in determining this question. But of the sea, as of the road, the law recognizes no inflexible rule,

§ (*r*) It will readily occur to the learned reader that this opinion of the Trinity Masters must be received with some qualification. Steam-boats, being generally under command, should give way to vessels close hauled. §

(*s*) See also the *Catharine of Dover*, 2

Hag. Ad. Rep. 145; the *Ligo*, 2 Hag. Ad. Rep. 356; the *Thames*, 5 Rob. Ad. Rep. 345; the *Shannon*, 2 Hag. Ad. Rep. 173; the *Dundee*, 1 Hag. Ad. Rep. 109.

(*t*) Emerigon *Traité des Assurances*, c. 12, s. 4. Pardessus, *Cours de droit Commercial*, tom. 3, p. 90.

the neglect of which by one party, will dispense with the exercise of ordinary care and caution in the other. No man is at liberty to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not use common and ordinary caution to be in the right. One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action,—a collision by the fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff (t).

In an action on the case for running down a ship, it appeared that the defendant's ship had the wind free, and was a light ship, and that the plaintiff's ship was hard up in the wind, and laden; that the defendant's ship ought to have given way and was wrong in not doing so. It was contended, however, for the defendant, that although he was wrong in not giving way, yet that the plaintiff could not recover; because he might have avoided the accident by altering his helm at the right moment. Mr. Baron *Bayley*, in delivering the judgment of the Court of Exchequer, said, "The rule is, that the plaintiff cannot recover if his ship were in any degree in fault in not endeavouring to prevent the collision. Here the plaintiff had a right to presume, that the defendant's ship would do what she ought to do. I quite agree, that if the mischief be the result of the combined negligence of the two, they must both remain *in statu quo*, and neither party can recover against the other. In this case, however, it was made out that the fault was wholly with the defendant; he had the wind, and should have given way, and the plaintiff had a right to expect that he would make room; he did not do so, and the consequence was, that the accident occurred for which he is liable" (u).

It appears, from the decision of the House of Lords above cited, that in the Court of Admiralty, where both vessels are in fault, the value of the cargo damaged or lost by the collision of two vessels is to be included in the estimate on which the apportionment is made. The laws of foreign countries differ materially upon this subject. By the *Hamburg* ordinance, the damage in all cases of accidental collision is to be apportioned on both vessels, their freights and cargoes, as in other general averages, each vessel

(t) *Butterfield v. Forrester*, 11 East, 60; *Handyside v. Wilson*, 3 Car. & Pay. 528; *Vanderplank v. Miller*, 1 M. & M.

169; *Bridge v. Grand Junction Railway Company*, 3 M. & W. 244.

(u) *Vennall v. Garner*, 1 C. & M. 21.

bearing one half (*x*). The *Swedish* and *Rotterdam* ordinances prescribe the same, if the vessels running foul of each other were both under sail (*y*). *Valin* discusses the various opinions upon this subject, and concludes, that the grounds of expediency on which the rule of apportioning the damage done by colliding vessels to each other is founded, does not apply to their cargoes; and, that unless blame be established against one of them, the loss on cargo must rest where it happens to fall (*z*). In *France*, the owner of merchandize lost or damaged by collision, cannot recover without proof that the master of one of the vessels was in fault. In the absence of such proof, the rule applicable to other cases of accidental damage prevails; the sufferer bears his own loss (*a*).

By the law of *England*, the liability to contribution, of cargo on board the wrong-doing vessel, could only lead to circuity of action, inasmuch as the freighter might recover the amount paid by him, from the owners of the ship. But an action may be maintained by the owner of goods lost or damaged by collision, against the owners of the vessel which can be proved to have been in fault. As between the owners and the freighter, in cases of accident, the injury caused by collision, is a peril of the sea within the usual exception of the charter-party (*b*). And in one case, a loss resulting from collision occasioned by gross negligence, was also held to have occurred by perils of the sea (*c*).

By a recent statute (*c*), in case of damage done by a foreign ship to any *British* ship, barge, boat, buoy, or beacon, such foreign ship may, by order of a judge, be arrested until the master, owner, or consignee undertake to appear, and be defendant in any action brought for such loss or damage, and give security for all costs and damages which may be recovered in such action (*d*).

The statutes by which the liability of the owners is limited to the value of the ship and freight apply to damage by collision (*e*). The responsibility of the owners of a chartered vessel (*f*) and of a vessel under the charge of a licensed pilot (*g*) has already been considered. §

(*x*) Tit. 8, Art. 1.

(*y*) Swed. tit. 8, ss. 1 & 8. Rotterd. ss. 255; Benecke, p. 222.

(*z*) Art. 10, tom. 3, tit. 7.

(*a*) Pardessus, Cours de droit Com. p. 3, tit. 2, c. 2.

(*b*) Buller v. Fisher, 1 Esp. 67.

(*c*) Smith v. Scott, 4 Taunt. 125.

(*d*) 1 & 2 Geo. 4, c. 75, s. 32.

(*e*) 53 Geo. 3, c. 159. The Dundee, 2 Hag. 133.

(*f*) Ante, p. 43.

(*g*) Ante, p. 182.

PART IV.

OF THE CARRIAGE OF GOODS IN MERCHANT SHIPS.

CHAPTER I.

OF THE CONTRACT OF AFFREIGHTMENT BY CHARTER-PARTY.

1. THE contract by charter-party, of which it is here intended to treat, is, as I have before observed, a contract, by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. A ship may indeed be let for other purposes, as to be employed in warfare, or the fishing, coasting, or other trade, under the entire management of the hirer; or by way of mortgage, reserving at least a temporary right of management to the letter; or one part-owner may let his share to another. But contracts of this nature do not form the subject of the present inquiry.

The term charter-party is generally understood to be a corruption of the Latin words *charta-partita* (a); the two parts of this and other instruments being usually written in former times on one piece of parchment, which was afterwards divided by a straight line cut through some word or figure, so that one part should fit

(a) Hargrave's note on 1st Inst. 229. Pothier, traité de charte-partie, num. 1, gives the same etymology of this word from Boerius, but with a different explanation. "It was formerly usual," says Boerius, "in England and Aquitaine, to reduce contracts into writing on a chart, divided afterwards into two parts from top to bottom, of which each of the contracting parties took one, which they

placed together and compared, when they had occasion to know the terms of their contract." If from this account we are to understand that the contract was only once written, and the paper or parchment, afterwards cut in two, the practice must have been very inconvenient, as neither party could, in the absence of the other, inform himself of the stipulation he had engaged to perform.

and tally with the other, as evidence of their original agreement and correspondence, and to prevent the fraudulent substitution of a fictitious instrument for the real deed of the parties. With the same design indentation was afterwards introduced, and deeds of more than one part thereby acquired among English lawyers the name of indenture. This practice of division, however, has long been disused, and that of indentation is become a mere form.

I propose, in the present chapter, to consider the modes in which this contract may be made, and to mention the usual stipulations contained in a charter-party, and some particular covenants, that have furnished occasion for the decision of a court of justice; reserving the consideration of the general duties that arise, as well out of the contract for conveyance in a general ship, as of this species of contract, for distinct chapters hereafter.

2. This instrument, when the ship is let at the place of the owner's residence, is generally executed by them, or some of them, (and frequently by the master also,) and by the merchant, or his agent. In a foreign port, it must of necessity, if it be by deed under seal, be executed by the master only, and the merchant or his agent, unless the parties have an agent resident in such port, authorised to this purpose, by deed or letter of attorney under seal.

I have before observed, that the execution of a charter-party by the master, although said to be done on behalf of the owners, does not furnish a direct action, grounded upon the instrument itself, against them. This depends upon a technical rule of the law of *England* (b), applicable as well to this as to other cases, and not affected by the mercantile practice of executing deeds for and in the name of absent persons; the rule of the law of *England* being, that the force and effect which that law gives to a deed under seal, cannot exist unless the deed be executed by the party himself, or by another for him, in his presence, and with his direction; or, in his absence, by an agent authorised to do so by another deed; and in every such case, the deed must be made and executed in the name of the principal (c). The agent, indeed, either

(b) *Harrison v. Jackson and Others*, 7 Term Rep. 207, and *Horsley v. Rush and Another*, (the case of a charter-party) there cited.

(c) If C. D., by a proper deed, authorise A. B. to execute a bond or other

deed for him, A. B. may do this either by writing "C. D. by A. B. his attorney," or by writing "A. B. for C. D.," provided he delivers the instrument as the deed of C. D. *Wilks and Another v. Backe*, 2 East, 142.

of the owner or merchant, may, and sometimes does, execute a charter-party and covenant in his own name, for performance by his principal, so as to bind himself to answer for his principal's default, by force of the deed. And in an action to recover freight or demurrage, claimed in pursuance of a charter-party by deed, it has been held, that the declaration must be specially framed on the deed itself (*d*). If such a charter-party be made between the master and the merchant, in pursuance of which goods are delivered to the merchant and his partners, the freight cannot be recovered in an action upon the case, brought by the owners against the merchant (*e*). So if the owner execute a deed to the merchant, containing the usual covenant for a right delivery of the cargo, he cannot be sued by the merchant for not delivering it, in an action upon the case, grounded on the bill of lading signed by the master (*f*). But where a charter-party under seal was made by the master in that character, with merchants who did not know that he was also a part-owner in the ship, as in fact he was; it was held, that they might sue him and the other owners in an action upon the case for a breach of such general duties as were not inconsistent with the stipulations of the charter-party, such as the not providing necessaries for the voyage, and employing a negligent and unskilful master (*g*). And whether the instrument be under seal or not, an action at law grounded upon it, must be brought in the name of the party to it, and not in the name of another, to whom he may have assigned his interest. And therefore the purchaser of a ship previously chartered cannot sue for the freight earned under the charter-party in his own name (*h*), although payment to him will be a good discharge to an action brought in the name of the seller, at least if the purchase be made before the ship sails on the voyage (*i*). In like manner, where goods were shipped, in pursuance of a charter-

(*d*) *Atty v. Parish*, 1 B. & P. New Rep. 104. But query of this decision as to an action brought by and against the parties to the deed, whether the declaration may not be framed in debt generally, and the deed given in evidence. See the opinion of Bayley, J., in the case of *Tilson v. The Warwick Gas Light Company*, 4 B. & C. 968.

(*e*) *Schack and Another v. Anthony*,

1 M. & S. 573.

(*f*) *Hunter v. Prinsep*, 10 East, 378.

(*g*) *Lealie v. Wilson and Others*, 3 B. & B. 171, and 6 B. Mo. 415.

(*h*) *Splidt v. Bowles*, 10 East, 279. The charter-party appears to have been under seal; *Morrison v. Parsons*, 2 Taunt. 407. The charter-party was not under seal.

(*i*) *Morrison v. Parsons*, *ubi supra*.

party made by the master with one *Partridge*, and whereby he engaged to receive a cargo of fruit from the agents or assigns of *Partridge*, and deliver the same to him or his assigns; and upon the shipment he signed a bill of lading, stating the goods to have been shipped by one *Strange*, by order of *Rovedino* and *Moore*s, to be delivered to the order of *Moore*s, and freight to be paid according to the tenor of the contract of affreightment; it was held that *Moore*s could not maintain an action against the master - for negligence in the stowing of the fruit (*j*).

Another technical rule of the law of *England*, applicable also to the contract by charter-party under seal, should be noticed in this place. If a charter-party is *expressed to be made between certain parties*, as between A. and B. owners of a ship, whereof C. is master of the one part, and D. and E. of the other part, and purports to contain covenants with C., nevertheless C. cannot bring an action in his name upon the covenants expressed to be made with him, nor give a release of them, even although he seals and delivers the instrument (*k*). But if the charter-party is *not expressed to be made between parties*, but runs thus: This charter-party indented witnesseth, that C., master of the ship W., with consent of A. and B., the owners thereof, lets the ship to freight to E. and F., and the instrument contains covenants by E. and F. to and with A. and B.; in this case A. and B. may bring an action upon the covenants expressed to be made with them; although, unless they seal the deed, they cannot be sued upon it (*l*). This latter, therefore, is the most proper form.

3. By this contract a ship is let for a voyage to one or more places: the freight is expressed to be a sum of money for the entire ship, or an entire part of the ship, or for each ton or other portion of its capacity; and this sum is again either a gross sum for the whole voyage or voyages, or a particular sum for every month or week of the ship's employment; sometimes also the freight is expressed to be a certain sum for every ton, cask, or bale of

(*j*) *Moore*s v. *Hopper*, 2 B. & P. New Rep. 411. It does not appear by the report, whether the charter-party was by deed or simple contract; the declaration seems not to have noticed the charter-party.

(*k*) *Scudamore* v. *Vandenstene*, 2

Inst. 673. See also Lord Ellenborough's judgment in *Storer* v. *Gordon* and Others, 3 M. & S. 322; *Salter* v. *Kidgley*, Carthew, p. 76, and *Barclay* v. *Hardy*, K. B. Easter Term, 7 Geo. 4.

(*l*) *Cooker* v. *Child*, 2 Lev. 74, and see *Gilby* v. *Copley*, 3 Lev. 138.

goods put on board, in which case the merchant usually covenants not to put on board less than a specified number of tons, casks, or bales; and where the payment is to be by the ton of goods, it is usual and proper to add, "and so in proportion for a less quantity than a ton," as it was formerly decided in a case where these words were omitted, that the owner could recover nothing for a hogshead (*m*). These variations in the mode of paying the freight have given rise to some questions and decisions on that article, which will be more properly noticed in the chapter on freight.

4. The merchant, who has so hired a ship, may lade it either with his own goods, or, if he has not sufficient, may take in goods of other persons, or he may wholly underlet the ship to another. By the *French* ordinance, underletting at an advanced price is prohibited (*n*); a wise regulation, though not adopted by our law (*o*), and perhaps not rendered necessary by the practice of our merchants. If it be necessary, a clause may easily be introduced into all charter-parties to prevent the practice.

5. The charter-party usually expresses the burthen of the ship (*p*), and by the *French* ordinance it is required to do so (*q*). A mistake in the amount of the burthen, may in some cases be prejudicial to one party or the other. The *French* ordinance provides that the master, who declares his ship to be of a burthen exceeding the truth, shall answer the merchant in damages; but that an error shall not be deemed to exist, unless it exceeds a *fortieth* part (*r*). According to *Molloy*, if a ship be freighted by the ton, and found of less burthen than expressed, the payment shall be only for the real burthen (*s*). And if a ship be freighted for *two hundred* tons, or *thereabouts*, the addition of *thereabouts*, says the same author, is commonly reduced to be *five* ton, more or less. Where a ship was described in a charter-party, as of the burthen of 261 tons or *thereabouts*, and the owner covenanted to receive at a foreign port, a full and complete cargo, and the merchant covenanted to load such full and complete cargo; the burthen of the ship thus expressed, was held not to conclude the parties, and the merchant was held answerable upon this covenant

(*m*) *Rea v. Burnis*, 2 Lev. 124.

(*n*) Liv. 3, tit. 3, fret. art. 27.

(*o*) *Macpherson v. Begbie*, 6 Bing. 190.

(*p*) See on this head *Straccha de na-*

vibus, par. 3, num. 4, ad. 14 inclusive.

(*q*) Liv. 3 tit. 1, *Charte-parties*, art. 3.

(*r*) Liv. 3, tit. 3, fret. art. 4 and 5.

(*s*) *Molloy*, book 2, chap. 4, s. 8.

for not having furnished a full cargo, although in fact he furnished as many as 261 tons, and it appeared that the ship was capable of carrying 400 tons of goods of the description mentioned in the charter-party, the representation of the burthen not appearing to have been fraudulently made (*t*).

If, therefore, it is intended to confine the operation of a charter-party as to this matter, to the number of tons mentioned therein, or in the certificate of registry, care should be taken to do this, by some words properly suited to such purpose.

By the statute 4 Geo. 4, c. 88, limiting the number of passengers to be conveyed in ships, between *Great Britain* and *Ireland*, it is expressly enacted, that "a ship shall be deemed and taken to be of the tonnage described and set forth in her certificate of registry" (*u*). And by the 5 & 6 Wm. 4, c. 53, the proportion of passengers to the tonnage is to be computed on the registered burthen of the ship.

6. The contents of this instrument are varied according to the nature of the intended voyage, or the will of the parties; but the usual stipulations on the part of the owner or master, are that the ship shall be tight and staunch, furnished with all necessaries (*x*), for the intended voyage, ready by a day appointed to receive the cargo, and wait a certain number of days to take it on board. That after lading, she shall sail with the first fair wind and opportunity to the destined port, (the dangers of the seas excepted) and there deliver the goods to the merchant or his assigns, in the same condition they were received on board; and further, that during the course of the voyage, the ship shall be kept tight and staunch, and furnished with sufficient men and other necessaries, *to the best of the owner's endeavours*.

The owner may indeed, and sometimes does, by special clauses make himself still further liable, and render himself answerable in the case of accidents or misfortunes, which otherwise would furnish him with an excuse. As in the case of a charter-party made with the commissioners of the Transport Office, by which the owner covenanted that the ship should be manned with a specific number of men in proportion to her bulk, and that the

(*t*) *Hunter v. Fry*, 2 B. & A. 421.

(*u*) See the case of *Bishop and Another v. Mackintosh and Another*, 2 B. & C. 656, on the repealed act 43 Geo. 3, c. 56.

(*x*) If a bill of health be essential to the performance of the voyage, it is considered as a necessary document; *Levy v. Costerton*, 1 Stark. 212.

whole number should be constantly on board, and which contained a proviso that the commissioners should be at liberty to mulct and make such abatement out of the ship's pay, which was a fixed sum for twelve months, as they should think reasonable, "upon the loss of time, breach of orders, or neglect of duty by the master, or from the ship's inability to execute or proceed on the service on which she might be employed, being made appear." It was held that the commissioners had a right to make an abatement, a service to which the ship was ordered at *Quebec*, having been delayed for a considerable time, from want of mariners, although the want was occasioned by the death of some of the original crew, who had died of the small-pox in the course of the voyage thither, the desertion of others at that place from fear of the distemper, and it was impossible to procure a fresh supply of hands during the time (*y*).

On the other hand, the merchant usually covenants to load and unload the ship within a limited number of days after she shall be ready to receive the cargo, and after arrival at the destined port; and to pay the freight in the manner appointed. Frequently also it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay, and the payment to be made for it, are both called *demurrage* (*z*). Sometimes also particular clauses are introduced in favour of the owners, to take away their responsibility for embezzlement of the master, or other matters, for which they would otherwise be answerable.

7. It is usual also for each of the parties to these contracts

(*y*) *Beatson v. Shank and Others*, 3 East, 233.

(*z*) The master of a ship brought an action to recover a compensation in damages for the detention of his ship beyond a reasonable time for the delivery of her cargo in the port of London, and declared also generally for demurrage. It was held, that such an action could not be maintained by the master, whatever right the owners might have to sue in their own names. It does not appear by the report what were the terms of the contract under which the cargo had been brought, nor is it distinctly alleged that there was any written contract, *Brouncker*

v. Scott, 4 Taunt. 1. In another case it was held, that the master of a ship, who, by the bill of lading, has undertaken to deliver goods to the consignee on payment of freight, cannot maintain an action against the consignee on an implied contract to pay a demurrage, *Evans v. Foster*, 1 B. & Ad. 118. And (per Lord Tenterden) the inconvenience resulting from these decisions may be obviated by the insertion of a few words in the margin of the bill of lading, as was done in *Jesson v. Solly*, 4 Taunt. 52, in which it was held, that the master might maintain this action.

to bind himself, his heirs, executors and administrators; and the owner or master to bind the ship and her freight; and the merchant the cargo to be laden; in a pecuniary penalty for the true performance of their respective covenants; this is commonly done by a clause at the end of the instrument. Such a clause is not the absolute limit of damages on either side; the party may, if he thinks fit, ground his action upon the other clauses or covenants, and may in such action recover damages beyond the amount of the penalty, if in justice they shall be found to exceed it (*a*). On the other hand, if the party sue on such a penal clause, he cannot in effect recover more than the damage actually sustained.

But although the ship and freight are by the terms of a charter-party expressed to be bound to the performance of the covenants on the part of the owners or master, and this is conformable to the maritime law; yet, as I have before observed (*b*), there does not appear to be at present any mode of obtaining in this country the benefit of the security of the ship itself in specie, for the performance of such a contract made here.

The clause whereby the merchant binds the cargo, does not give to the owner a lien on the cargo by way of general security for the performance of the covenants in the charter-party, nor for any payment for which he might not detain it in the absence of such a clause, so that with us the clause is inoperative. In the cases where a lien is allowed, it is not derived from this clause, but either from some general principle of law or some special contract. Where it depends upon a general principle of law, it is confined to the specific chattels, or some part thereof, in respect of which the payment is claimed, and consequently, goods actually brought by a ship cannot be detained for a breach of a covenant to furnish a full cargo; nor for demurrage (*c*); nor for pilotage or port charges, although the freighter may have engaged to pay them (*d*). A lien may be extended further, or wholly excluded by particular contracts, or special circumstances.

In the case of *Birley v. Gladstone*, an entire ship was chartered for a voyage out and home, and by the terms of the charter-party, the merchant covenanted to pay for the homeward cargo at certain

(*a*) *Harrison v. Wright*, 13 East, 343.

(*b*) Ante, part 2, chap. 2, sect. 5, p. 93.

(*c*) *Phillips v. Redie*; *Birley v. Glad-*

stone, 3 M. & S. 205.

(*d*) *Faith v. East India Company*, 4 B. & A. 630.

rates per ton, on delivery of the cargo at *Liverpool*, by bills at three months; to load a full cargo, and to pay demurrage, and he bound the goods to the performance of his covenants. The Court of King's Bench decided that the owner could not detain the goods, either for the freight of such as were put on board, but afterwards relanded by compulsion, or for dead freight, or for demurrage. A bill was afterwards filed in Chancery for the purpose of obtaining a declaration, that the ship-owners were entitled to a lien in equity, but the Master of the Rolls, Sir William Grant, dismissed the bill; in the course of his judgment, his Honor said, "There can be but one right construction of the clause, and if it could be said that the Court of King's Bench had ill construed it, this is not a court of appeal in which their decision can be corrected. It was asked, what effect the clause could have, if it gave no lien either in law or equity? A Court of Equity is not bound to find an equitable effect for a clause, merely because the construction which a court of law has put upon it would leave it inoperative. In truth, it has been copied from foreign charter-parties, with very little consideration of the effect that might be allowed to it in the law of this country. I think it very probable, that in other countries it would have the effect of entitling the ship-owner to retain the cargo for every sort of demand that could accrue to him under the charter-party" (e).

Neither can the owners in all cases have the full benefit of this clause, as giving a lien on the cargo for the payment of what is usually denominated freight. To this purpose the following case is in point: Two persons, who were factors, hired a ship of one *Paul*, at the rate of 48*l.* per month, and executed a charter-party, by which the goods to be put on board were made liable to him, and they had power to appoint the master and mariners. Some merchants in the *West Indies* loaded the ship with goods, and allowed the factors 9*l.* per ton for the carriage. The factors who had thus chartered the ship in their own name became bankrupts. *Paul* instituted a suit in the Court of Chancery to compel the merchants to pay him for the hire of the ship, insisting that they were liable to do so by reason of this clause in the charter-party. But the Lord Chancellor *Hardwicke* decided that he should recover of them no more than they had engaged to pay the factors for the freight, and that they were not liable to make

(e) *Gladstone v. Birley*, 2 Mer. 401; *Birley v. Gladstone*, 3 M. & S. 205.

up the deficiency to him. His Lordship observed, that by the general law, the cargo is liable to pay the freight; but that in this case, the 48*l.* per month was improperly termed the freight of the goods, being rather the hire of the ship; that the factors had made an agreement with the master on their account, and not on the part of the merchants, and. therefore ~~the~~ merchants were not liable; otherwise they would be in the hardest case imaginable, for they would be liable to any private agreement between the occupier of a ship and the original owners of it, "a person," said his lordship, "that lets out a ship to hire, ought to take care that the hirer is a substantial man, it is his business to look into this; and if the persons who hire are not competent, the master must suffer for his neglect. Whatever hardship, therefore, there may be on the one hand to the person who lets out to hire, the hardship is much greater on the other side; and what gives additional weight to the merchant's case, is the great convenience this gives to trade in general" (*f*).

§ A similar decision was pronounced in the case of *Mitchell v. Scaife* (*g*), although it does not appear from the report that the charter-party contained the clause in question. In that case, which was an action of trover for cotton and logwood, the defendant, being part-owner of the ship *Cossack*, by a charter-party let her for a voyage from *Liverpool* to *Jamaica* and back, for a gross sum, by way of freight. The captain signed bills of lading for the cargo, which belonged to a third person, specifying a rate of freight, amounting to a less sum than that mentioned in the charter-party, Lord *Ellenborough* said, "I am of opinion that the ship-owner had no right to detain the cargo for more than the freight mentioned in the bill of lading. The plaintiff is the *bond fide* indorsee of the bill of lading. We know that this is an instrument which the master has in general authority to sign, and the plaintiff seems to have had no reason to suspect that this authority was not properly exercised upon that occasion. Under such circumstances the owner of the ship cannot be heard to aver against the contract created by his own agent through the medium of the bill of lading." In the case of *Christie v. Lewis*, (*h*), Mr. Justice *Richardson* said, "It is true, that according to the decision in *Paul v. Birch*, the owner has not a lien on the goods mentioned

(*f*) *Paul v. Birch*, 2 Atk. 621.

(*g*) 4 Campb. 298.

(*h*) 2 B. & B. 410.

in the bills of lading for all his freight due on the charter-party, but he is entitled to the freight on the bills of lading in preference to the freighter. This doctrine was again recognised by Lord *Tenterden* and Mr. Justice *Bailey*, in the case of *Faith v. East India Company* (i), and more recently by the present Chief Justice of the Court of Common Pleas (k). §

8. The word *lien*, in its proper sense in the law of *England*, imports, that the party claiming it, is in the possession of the thing which he claims to detain. Where there is no possession actual or constructive there can be no lien. § The absolute owner of a ship, so long as he continues in possession of the ship, is in possession also of the goods carried by her, and his right to a lien on them, for the freight due in respect of them, whether by charter-party or under a bill of lading, has never been questioned.

It is clear that an owner in possession of a ship, may, if he think proper, part with his possession, he may demise her for a term, surrender all control over the ship itself, the appointment of her master and mariners, and relieve himself from responsibility for wages and repairs (l). If he do so, the person to whom he lets the ship, who is called the charterer, becomes owner *pro tempore*; the rights of the absolute owner are suspended, and among them his right of lien for freight on goods carried by the ship.

Such a demise can rarely be essential to the useful employment of a ship by its owners. In most cases, that object will be as well attained, by the loan of a ship's use, as by an absolute transfer of possession, and ships being of great value, and freights of considerable amount, it would seem, in the words of Lord *Tenterden* (m), "to be an act of imprudence on the part of a ship-owner, to enter into a contract, which may have the effect of employing his ship for a long time, and at a great expense to himself, without any remuneration, if the person with whom he contracts should happen to fail before the termination of the voyage." Accordingly, except in cases, where the intention of the parties to make and take a demise of the ship, is clearly to be collected from the terms of their contract, as explained by the nature of the service on which the ship is to be employed, the Courts have been solicitous

(i) 4 B. & A. 630.

(k) *Small v. Montes*, 2 Bing. 574.

(l) See Mr. Justice Richardson's judg-

ment in the case of *Christie v. Lewis*, 2 Brod. & Bing. 442.

(m) *Saville v. Campion*, post.

to interpret charter-parties, in a sense "agreeable to the nature of the contract, that a prudent ship-owner would make," preserving to the owner the constructive possession of his ship, and his lien for freight upon the goods carried by her. Before the case of *Hutton v. Bragg* (n) the first in which the ship-owner's lien for freight due to him under a charter-party was directly questioned, it had been decided, in several cases, that not the absolute owner, but the charterer of a ship was to be considered the owner *pro tempore*, and subject to the responsibilities which attach to that character. Thus the case of *Parish v. Crawford* (o), was no longer considered as authority. The doctrine in *Vallejo v. Wheeler* (p), and *Mackenzie v. Rowe* (q), continued unimpeached, and although it had been determined, in the case of *Bohtlingk v. Inglis* (r), that the delivery of goods on board a ship, of which the vendee was the charterer, was not such a delivery to him, as would preclude the right of the vendor to stop them *in transitu*, in case of the vendee's insolvency; it was held, in a case in which a vessel had been *chartered for a term of years*, during which period the charterer was to have the entire disposition and control of her, that the vessel was the charterer's own, and the delivery of goods to his order on board, was the same thing as delivery into his warehouse (s).

The case of *Hutton v. Bragg* was an action of trover by the assignees of a bankrupt, for goods detained by the defendant, who was the owner of the ship *Neptune*, on a claim of lien for freight, due to him by the bankrupt, in respect of the goods. It appeared, that the defendant had chartered his ship to the bankrupt for a voyage from *London* to the *Cape of Good Hope* and back, and that the bankrupt covenanted to pay a gross sum of £1000. as freight for the voyage out and home. The charter-party expressed that the ship was *let out to freight* (t) for the above mentioned voyage, but that the master should reserve the cabin for his sole use and for the usual accommodation for his crew and ship's stores, and that the freight should be paid by bills drawn during the voyage,—or

(n) 7 Taunt. 14.

(o) 2 Stran. 1252, *ante*, p. 32.

(p) Cowp. 143.

(q) 2 Campb. 482, *ante*, p. 34.

(r) 3 East, 384.

(s) *Fowler v. Kymer* or *M'Taggart*,

cited in the case of *Inglis v. Usherwood*, 1 East, 615, and 3 East, 396.

(t) This does not appear from the report, but it was admitted to be so in the case of *Saville v. Campion*, hereafter cited.

upon the return of the vessel home. The ship performed the voyage agreed upon; but upon her arrival in the *Thames*, several of the bills drawn during the voyage had been dishonoured, and the freighter was in that state of insolvency that the owner asserted this right of lien as a security for his freight, and took possession of the goods, for which the action was brought. It was contended, on the part of the plaintiffs, that the ship having been let for the whole voyage to the bankrupt, the shipment of goods upon her did not give any lien upon them to the defendant, that the ship was entirely under the control of the freighter, and that such a letting was of the same nature as letting a house or hired room, that the gross sum to be paid for the hire, was rent, rather than freight, and that the defendant never had any possession of the cargo upon which to exercise his lien, Lord Chief Justice *Gibbs*, in delivering his judgment, said, "We decide on the general ground that there is no lien whatever under the circumstances of this case. The defendant is the owner of a ship, the bankrupt is the charterer of a ship; and for one sum of £1000. he was to have the whole use of the ship for the voyage out and home. It is clear, that he might have put this up as a general ship, have filled her with goods of other persons, and when they came home the defendant could not have touched those goods by way of detaining them, till his freight was paid him by the charterer. But here it is contended, inasmuch as these are the goods of the charterer put on board by himself, the defendant might detain these goods, till those dishonoured bills were paid by the charterer. He could not have had this right unless he had a lien on the goods, he could not have a lien on the goods unless he had in some sort the possession of the goods,—here he had no possession of the goods whatever. The consignor is a bankrupt; he was the owner of the ship for the voyage. He puts his own goods then on board his own ship, and the master and the crew ought to have obeyed his orders for the voyage." Lord *Hardwicke*, in *Paul v. Birch*, says, "the sum reserved is improperly termed freight, for it is rather for the hire of the ship." It is indeed more like rent than freight. If, then, the bankrupt be owner for the voyage, and if it be the duty of the master and crew to obey the owner's instructions, when the bankrupt puts his own goods on board his own ship, the master and crew ought to obey him until the voyage is ended, which is not until a full delivery of the goods, and until that time the possession of the ship does not

revert to the owner." In this opinion, which is said to have occasioned some alarm to the shipping interests, Mr. Justice *Dallas* and Mr. Justice *Park* concurred. It appears, from the report of the case which immediately followed, that the opinion of the Lord Chief Justice was much influenced, by the strong expressions of the charter-party, "*let the vessel to freight to the merchant who hath accordingly hired and taken the same,*" and indeed this was expressly so stated by him in the course of the argument.

In that case, *Tate v. Meek* (u), the defendant, as owner of a vessel, covenanted by charter-party with *A.* the freighter to take on board a cargo in the *Brazils*, and deliver the same in *England*. *A.* covenanted to put the cargo on board, and pay freight at a certain rate per ton, part in money on the arrival of the vessel, and the remainder by bills at two months after the delivery of the cargo. The owner bound the vessel and her freight, and the freighter bound the cargo, for the due performance of their respective covenants. Part of the cargo was shipped for *A.*, and part for other consignees. The defendant delivered the goods to the other consignees, on payment of the freight, at a less rate than that contracted for by the charter-party; but refused to deliver to the plaintiffs, the goods consigned to *A.*, which he had assigned to them, without their paying the whole of the freight due, under the terms of the charter-party. *Gibbs*, C. J., in delivering the judgment of the Court said, "This and the two other cases dependent on it, stand on a very different ground from *Hutton v. Bragg*. There—was no covenant for the delivery of the goods, nor any question on the effect of cross covenants for the delivery of the goods on the one side, and the payment of freight on the other side. Here,—the ship-owner covenants that he will deliver the goods agreeably to the bills of lading. And the merchant covenants that the freight and primage shall be paid as follows, namely, 300*l.*, part thereof to be paid in cash forthwith, on the day the brig should be reported inward at the Custom-house, in the port of *London*, on her return from the voyage, and the remainder of the freight and primage to be paid by a good and approved bill or bills, payable in *London*, at two months after date, from the day on which the delivery shall be completed. The ship was duly laden at *Bahia*, and bills of lading were

(u) 8 Taunt. 280.

signed, making the goods deliverable to the freighter or his assigns, they paying freight according to the charter-party. The goods in question remained undelivered at the disposal of the master. The merchants required these goods to be delivered to them without tendering any bill or security. The question is, whether the delivery of the goods and payment by a bill be not concomitant acts, which neither party is obliged to perform without the other being ready to perform the correlative act? We think they are such. If the whole cargo had been one bale of goods, there would have been no doubt, but the difficulty is, that the remainder of the freight is to be paid by bills, to bear date from the day of the delivery, and the delivery may take several days. We think the captain might obviate this by landing the cargo in his own name, and tendering a bill for the whole amount dated from that day. We are the more satisfied with this judgment, because it not only meets the justice of the case, but the parties, if dissatisfied with it, have liberty reserved to turn the case into a special verdict."

In *Yates v. Railston* (v) the owner of a vessel by deed indented, granted and let his ship to freight, and covenanted that she should proceed in ballast to *Miramichi*; there take in a cargo from the agents of the freighter, therewith proceed to *Liverpool, Hull, or London*, as she should be directed by the freighters, and there make delivery to the freighters; and the freighters covenanted to deliver the cargo to the ship at *Miramichi*, and to pay the freight on delivery to them at her homeward port, part in money, and the remainder by bills at four months. In this case the Court also determined in favour of the owner's lien. *Gibbs, C. J.*, said, that the same observation which had been made in *Tate v. Meek*, applied here, that the delivery of the cargo and the payment of the freight were concomitant acts, and the one could not be required without performance of the other.

In *Yates v. Meynell* (w), which was a similar case to *Yates v. Railston*, *Gibbs, L. C.*, gave the following judgment. "Here, also the freight is to be paid on the delivery of the goods. In all these cases the difficulty exists which I stated in the first of them, that the remainder of the freight is to be paid by bills, to bear date from the day of the delivery, and the delivery may take seve-

(v) 8 Taunt. 293.

(w) 8 Taunt. 302.

ral days. But for the reasons stated in the first of them, we are of opinion in all these cases that the owner of goods cannot require them to be delivered without satisfying the ship-owner for the freight that remains due."

From these cases, and particularly that of *Yates v. Railston*, it has been rather hastily assumed, that Chief Justice Gibbs was disposed to recede from, or at least materially qualify, the general terms of his judgment in the case of *Hutton v. Bragg*. It distinctly appears, from the judgment of Chief Justice Dallas, in the subsequent case of *Christie v. Lewis* (a), that there is no ground for that assumption. In the case of *Yates v. Railston*, the charter-party certainly contained the words "*granted and let*" the ship for the voyage in question, but the construction of those words, as an actual demise of the ship, would have been inconsistent with the other stipulations in the charter-party, which clearly showed an intention, that the possession of the ship should not pass to the charterer.

In the next case, that of *Saville v. Champion* (b), it was covenanted by charter-party that the owner should take on board his ship in *London*, all such goods as the freighter thought fit to load, and should proceed therewith to *Madras*, and there, after delivering her outward cargo, receive from the freighter's agents, a homeward cargo, and deliver the same in *London*; freight to be paid at so much per ton on the registered tonnage of the ship, 500*l.* at the expiration of six months from the date of the charter-party, a moiety of the remainder by bills at two months, and the residue by bills at four months, to be delivered on the day of the ship's arrival in the *Thames*; the ship to take her regular turn in the *East India Docks*. It was further agreed by the owner, that such passengers as might be required by the freighter, should be conveyed in the ship, and that all the cabins, except one, should be for the benefit, and at the disposal of the freighter. The freighter covenanted to send goods alongside the ship, and to receive them from alongside, and there was a special clause, providing, that the freighter might appoint a person to go out and home as super-cargo, and to take upon himself the authority of the commander, in the stowage of the cargo, but not to interfere with the duties of the commander, in any other manner, without his leave.

(a) Post, p. 227.

(b) 2 B. & Ald. 503. The reader is requested to refer to the report; the

charter-party, which contains many special provisions, is too long for insertion here.

Lord *Tenterden*, delivering the judgment of the Court of King's Bench said, "It was contended, that this being a chartered ship, the charterer was to be considered as the owner for the voyage, according to the cases of *Vallejo v. Wheeler* (c), and the *Trinity-House v. Clark* (d); and that, consequently, the merchant charterer being the person in the possession of the ship, was also the person in possession of the goods on board the ship, and the defendant, who had thus parted with the possession to him, could not, by law, have a lien upon the goods of which he never in law had the possession; and the case of *Hutton and Others v. Bragg* was referred to as an authority in point. It was observed, that although the charter-party in this case, did not contain, any terms of demise or letting to freight, as the instrument in the case of *Hutton and Others v. Bragg* was assumed to do, yet that it contained matter equivalent to such words; as a lease for years of a chattel real may be made without express words of demise, any words plainly shewing that the one party is to give up to the other, and the other to take and hold possession of the land, for a definite time, being sufficient to constitute a lease. This latter proposition is undoubtedly true; but upon an attentive consideration of the charter-party, in the present case, we find nothing either in its language, or in its object, which imports that the merchant charterer was to have possession of the ship. The whole instrument contains matter of contract and covenant only. At the making of the contract, the ship was under the government of *Price*, the master, as the servant and agent of the defendant, the owner, and so continued, in fact, during the whole voyage. The owner agrees that such passengers as may be required by the freighter, shall be conveyed in the ship; and that all the cabins, except one, shall be for the benefit and at the disposal of the freighter. The freighter agrees to send goods alongside the ship, and to receive them from alongside; and there is a special clause providing, that the freighter may appoint a person to go out and home as super-cargo, and to take upon him the authority of the commander, in the stowage of the cargo, but not to interfere with the duties of the commander in any other manner without his leave. So that there is not any one act to be done on board the ship by the freighter or his agents, except the stowage of the goods, which is specially provided for; and this special provision, as well as the clause relating to the

(c) Ante, p. 34.

(d) Ante, p. 36.

cabins, would be unnecessary, if it had been intended that the freighter should have possession of the ship; because in that event, he might stow and place goods and persons as, and where, he himself should choose, unless restrained by some special contract on his part. The charter-party in the case of *Hutton v. Bragg* was in terms of letting to hire. This does not distinctly appear by the report, but a copy of it was produced, and it was admitted to be so in the argument of the present cause. In the case now before the Court, the charter-party, as has been before observed, contains no such terms; nor does the nature of the service require that the merchant should be considered temporary owner in any question between him, or those who represent him, and the defendant. Upon this instrument, therefore, and between the parties to this suit, we think the defendant had the possession of the ship and goods for the voyage, and a lien on the goods for the stipulated hire of the ship, there being nothing to shew that the delivery of the goods was to precede the payment of that hire, in cash and bills as provided by the deed."

The case of *Christie and others v. Lewis* (e), in the Common Pleas, was the next case on this point. The owner, by charter-party, granted and to freight let, and the merchant took and to freight hired the ship for the voyage. The owner covenanted that the master should receive on board at London, goods to be sent alongside by the charterer, and deliver them from alongside at Newfoundland, according to bills of lading; there receive and deliver at Demerara other goods, and there, in like manner, receive other goods, and deliver them in the London Docks, according to bills of lading; and that the ship's boats should assist in loading and unloading, so as the exclusive duties and operations of the ship, should not be thereby impeded. In consideration whereof, the charterer covenanted to send and take goods from alongside, and to pay for the freight and hire of the ship for the voyage 2,600*l.*, with primage, &c., one quarter part thereof on delivery of goods at Newfoundland, by good bills at sixty days' sight on London, and the remainder by good bills at two months' date from the day of the ship's report inwards at the port of London. The voyage was performed, and goods of the charterer, and also goods of third persons brought from Demerara, under bills of lading, the latter being deliverable to the con-

(e) 2 B. & B. 410; 5 Moore, 211.

signees, on payment of certain specified freights, therein mentioned, which freights the defendant received. No bill for the three quarters' freight per charter-party having been given or tendered to him, and a bill for one quarter, given at *Newfoundland* having been dishonoured, the question was, whether the defendant had a lien on the freight received by him under the bills of lading from the consignees, for the amount due to him under the charter-party? Lord Chief *Dallas* was of opinion that the case must be governed by the decision in *Hutton v. Bragg*. "I know," said he, "no case, before nor since, repugnant to it, none repugnant in decision, none of necessity, inconsistent in point of principle, none in point of analogy the other way. It is admitted, and indeed it is self-evident, that a ship may be let to hire so as to constitute the party hiring, the owner for the time, provided that such appears upon the instrument to be the intent of the parties, and this may be done by apt words of hiring and letting, or by necessary construction. It is said that the mere words of hiring and letting will not of themselves invest a party with the possession of the ship, if all the provisions of the instrument qualify and restrain the words and show that the hiring and letting are not used in their ordinary sense and signification; in other words, that the construction must be on the whole instrument; and to this I agree, subject to this qualification, viz. that if the separate provisions of the instrument would be manifestly repugnant to giving such a construction to the general words, they ought not to receive it; but if there be no direct repugnance, then the general words being emphatic and essential words, and words applied to other subjects of known legal operation, cannot be rejected, but must operate according to their common, and still more, their received legal import." But the rest of the Court held, first, that notwithstanding the words of grant, taking the whole charter-party into consideration, the possession of the ship did not pass to the freighter, but remained in the owner; and that as the freight per charter-party was to be paid by him in good bills prior to the delivery of the homeward cargo, he had a lien thereon for such freight. Secondly, that he had a right to receive the freight per bills of lading from the consignees, and had a like lien on such freight when so received."

This question of lien next arose in the case of *Faith v. the East India Company* (f). It does not appear, from the report,

(f) 4 Barn. & Ald. 630.

that the charter-party contained any words 'of demise, or any provisions inconsistent with a mere contract for the loan and use of the ship, for the carriage of goods. Part of the freight was also to be paid on the delivery of the goods, and the master received express instructions from the owner "to sign all bills of lading with the clause of 'freight payable as per charter-party.'" The Court distinguished on these grounds the case from that of *Hutton v. Bragg*, and determined as to so much of the goods as were considered to belong to the charterer, that they were subject to the lien of the owner to the full extent of the freight due on the charter-party, and that as to the goods of sub-freighters they also were liable to the owner's lien to the extent of the freight due upon each of those consignments.

The last case in which the owner's lien for freight was directly in question, was the case of *Campion v. Colvin* (a), on the identical charter-party which was considered in the before cited case of *Saville v. Campion*. This case was determined after the decision of *Newberry v. Colvin*, in the Exchequer Chamber, had been affirmed in the House of Lords. "I am unable," said *Tindal*, C. J., "to come to a conclusion different from that at which the Court arrived in *Saville v. Campion*, *Tate v. Meek*, and some other cases in which it was held, that an owner retaining the possession of his ship has a lien on the cargo for the hire of the ship under the charter-party. It has been attempted to distinguish this case in two particulars. First, that this charter-party does not leave the owner in possession of the ship; and if it does not, he can have no such possession of the cargo as to entitle him to a lien for the hire of the ship; further, that according to the decisions, the owner has only been held entitled to enforce his lien, where the payment of the freight for the ship is to accompany or precede the delivery of the goods. With respect to the possession of the ship, the main reliance has been on *Newberry v. Colvin*. Let us see then, whether this case is distinguishable from *Newberry v. Colvin*,—I think it is distinguishable, in most material points. This is the ordinary case of an owner in possession of the ship, who covenants by his captain, to carry out goods to their destination, and to bring a cargo home, that is the ordinary case in which the owner has a lien for the hire of the ship, but such was not the case of *Newberry v. Colvin*, where the owner had parted with the possession of the ship, the charterer taken her into his service, and agreed to pay

(a) 3 Bing. N. C. 17.

for the *use* and *hire* of her, a certain freight. We have then to see here, whether the goods brought home were to be delivered before the payment of the tonnage freight, stipulated for by the charter-party, and it is only necessary to look at the terms of the charter-party to see that such is not the case. In the first place, the freight is to be calculated by the registered tonnage of the ship, perfectly independent of the value of the goods, that compose the cargo; in the next, 500*l.* of this freight, is to be paid down, at the expiration of six months from the date of the charter-party, a moiety of the remainder by bills at two months, to be delivered on the day of the ship's arrival in the *Thames*, and the residue by bills at four months, to be delivered the same day, that is, at a time necessarily anterior to the delivery of the goods, if we look to another part of the charter-party, which provides that the ship, after her arrival in the *Thames*, shall take her regular turn in the *East India Docks* for the purpose of such delivery. Looking therefore to the intention of the parties, it is clear the ship-owner meant to insist on the delivery of the bills, before the delivery of the cargo, so that with respect to the time at which the freight was payable, there is no difference between this and the preceding cases."

The decision, it may be remembered, in the case of *Newberry v. Colvin* (b), was, that as between *Betham*, the charterer, and the *shippers*: he was the owner *pro tempore*,—the carrier responsible for the goods entrusted to him.

These decisions, as was said by a learned judge (c), "may be explained," but they cannot in all material points be reconciled with each other, or with those of *M'Kenzie v. Rowe*, *Trinity House v. Clark*, *Dean v. Hogg*, in which the responsibility of the owners of chartered ships, to sub-freighters and others, have been considered. With respect to the ship-owner's lien for freight on the goods carried by his ship, it is impossible to deduce from them any principle of construction applicable to the contract of affreightment by charter-party, less indefinite than this, that it is to be determined by the terms and covenants of the charter-party taken altogether, reference being had to the object of it, and the nature of the ship's employment, a rule which would seem too vague to be a practical guide in the construction of mercantile contracts, inevitably tending to much un-

(b) *Ante*, p. 35.

(c) Mr. Justice Park, in *Christie v. Lewis*.

certainty respecting the rights of parties, and much consequent litigation. It is difficult not to assent to the opinion implied in a suggestion of Chief Justice *Dallas*, that if so much ingenuity had not been employed to discredit the decision in *Hutton v. Bragg*, common prudence would have induced parties to frame subsequent contracts in more intelligible terms. §

The right may exist, if it appears from the instrument, in any way that the payment is to be made in cash or bills, before or at the delivery of the cargo. On the other hand, it may distinctly appear, from the charter-party, that the owner has been content to trust to the personal responsibility of the merchant, and by fixing a specific time of payment, before or after delivery, to waive his right of lien (*d*). The cases also show, that the goods of the charterer may be detained, not only for freight properly so called, but also for a sum agreed to be paid for the use and hire of the ship, although the goods of others laden on the ship, can only be detained for the sums that they may have agreed to pay the charterer, or that may be mentioned in the bill of lading, and that the bankruptcy of the charterer, or any assignment or pledge made by him of his goods, does not deprive the owner of his right (*e*).

§ The practical application of the rule of construction above stated, will probably be found to be, that the language of a charter-party must be very strong indeed, to defeat the owner's right of lien on goods carried by his ship. The Courts uphold its exercise in cases of doubtful construction, and whenever a contrary intention does not clearly appear, from the words employed by the contracting parties, or by necessary implication from them.

It need scarcely be added, that an express contract is the surest and strongest ground, upon which the right of lien can in any case be placed, and that by inserting an agreement respecting it in the charter-party, the parties to it may, between themselves, obviate all difficulty upon the subject. Thus, where it was expressly agreed and understood between the parties, that the ownership of the ship during the continuance of the charter-party, should "remain, firmly and be fully vested in the owner, and that he should at all times during the said intended voyage and service, have a full and complete lien upon the lading of the ship as well for all losses and damage which the said owner might sustain, or be put to, in consequence of the non-payment of any of the bills to be given for freight

(*d*) *Lucas v. Nockells*, 4 Bing. 729.

(*e*) *Faith v. East India Company*, 4 B. & A. 630.

as for all arrears of freight, &c. and should have full power and authority to hold and retain the said goods, until full payment of all such losses, charges, damages, and arrears of freight paid for, or on account of the charterer, and which he of right ought to bear and pay agreeably to the true intent of the charter-party," the Court of Common Pleas was of opinion, that it was unnecessary for the purpose of deciding a claim of lien, set up by the ship-owner, to consider whether the possession of the ship remained in him, or had passed to the charterer (e). §

In the discussion of some of the cases, an argument against the right of lien was advanced, from the circumstance, that a large cargo cannot be delivered from the ship all at once, to which it was answered, that the master might land the goods at a wharf, and detain them there. Where it appeared that the goods had been deposited in pursuance of an Act of Parliament in the *East India Docks*, or the warehouses of the *East India Company*, and notice given to detain the goods or their proceeds for the freight by which the lien of the owner was preserved; the Company has been, under such circumstances, considered as the agent of the owner for this purpose (f). The bankruptcy of the charterer, or any assignment or pledge made by him of his goods, does not deprive the owner of his right of lien (g).

Before I quit this subject, I should observe, that where the payment is to be made by approved bills, if the owner object to a bill delivered to him, but afterwards negotiate it, he thereby loses the benefit of his objection, and his right to detain the goods (h).

9. In all maritime transactions, expedition is of the utmost importance, for even by a short delay, the season or object of a voyage may be lost. And, therefore, if either party is not ready by the time appointed for the loading of the ship, the other may seek another ship or cargo, and bring an action to recover the damages he has sustained. * Nay, according to *Molloy*, even if part of the lading be put on board, and the merchant cannot furnish the residue, the owner may annul the contract, and lade his ship with other goods (i); but the same author adds, that it is by no means prudent to do so, without good reason and deliberation. And notwithstanding this opinion of the author, who here alludes to a contract for an entire lading, I apprehend the owner has not

(e) *Small v. Moates*, 9 Bing. 574.

(f) *Faith v. East India Company*, 4 B. & A. 630

(g) *Faith v. East India Company*;

Campion v. Colvin, supra, and *Small v. Moates*, 9 Bing. 574.

(h) *Horncastle v. Farran*, 3 B. & A. 497.

(i) *Molloy*, book 2, chap. 4, sec. 3.

strictly a right to annul the contract, or take other goods without the merchant's consent: he certainly ought not so to act, if the merchant is a responsible person; for he will have a right to sue the merchant upon the covenant for a deficiency in the cargo, and therefore it seems reasonable that the merchant, upon whom the loss arising from the deficiency will fall, should have the right to take the loss upon himself, and order the ship to sail. And accordingly, the *French Ordinance* directs, that if the ship be freighted by the great, and the merchant do not furnish a full lading, yet the master shall not, without his consent, take in other goods to complete the lading, nor without accounting to him for the freight of such goods (i); which direction is consonant to general principles of law; for the hirer has a right to use the thing hired in any manner most agreeable to himself, not differing from the purpose for which it was let to him. And in this particular case, the sale of the merchant's goods may be prejudiced by taking other commodities to the market, for which he has destined them. But on the other hand, if the merchant is known, or reasonably suspected, to have become insolvent, the owner will incur no risk of damages by taking other goods to secure his freight. And he should not trust to a supposed lien upon the goods actually laden as a security for the loss he may sustain, from the want of an entire cargo.

A charter-party, like every other deed, *takes its effect* and operation, from the day on which it is sealed and delivered, and not from the day on which it bears date, if different from the day of the delivery, unless there be words of reference to the day of the date. And, therefore, where by a charter-party dated the 9th day of *October*, but not delivered till the 28th of *October*, one party covenanted to pay a moiety of the value of all the corn "which then was, and thereafter should be, laden on board the ship," it was held that he was not liable to pay for any corn that was not really on board the ship on or after the 28th of *October*. In fact, the corn was cast away between the 9th and the 28th of *October* (j).

10. The general rule which our Courts of Law have adopted in the construction of this as well as other mercantile instruments, is, that the construction should be liberal, agreeable to the real

(i) Liv. 3, tit. 3, Fret. art. 2; Pothier, *Charte-partie*, num. 20.

(j) *Oshey v. Hicks*, Cro Jac. 263.

intention of the parties, and conformable to the usage of trade in general, and of the particular trade to which the contract relates. Few cases, however, on this head have received a judicial determination, I will here mention such of them as do not more properly relate to the other divisions of this treatise.

A ship was chartered for a voyage from *England* to any port or ports in *St. Domingo*, there to deliver her outward cargo, and take in a return cargo for *England*, and the merchant covenanted to procure a license. He did in fact procure a license with which the ship sailed to the ports of *Cape François* and *Gonaïve*, (both of which were under the dominion of *Christophe*, and not in the power of the enemies of *Great Britain*), and there delivered her outward, and received a return cargo. She was afterwards taken by one of his Majesty's frigates, and condemned at *Jamaica*, upon the supposed necessity of a license for this voyage, and the insufficiency of the actual license to protect the return cargo. The sentence was reversed upon appeal, the owners paying the captor's costs, it being considered that no license was necessary for the voyage to the ports before mentioned, although a license would have been necessary for such a voyage to some other ports of *St. Domingo*. In an action against the merchant for not procuring a sufficient license, it was held, that as his covenant to procure a license was in fact immaterial, none being necessary, he was not answerable for the consequences of it's alleged insufficiency (*k*).

In a case which happened in the beginning of the reign of King Charles I., the owner or master covenanted that his ship should sail with the first wind on a voyage to *Cadiz*, and the merchant covenanted that if the ship should go on the intended voyage and return to the *Downs*, he would pay a certain sum; to recover this sum an action was brought. The merchant pleaded in his defence, that the ship did not sail with the next wind, but without imputing any unreasonable delay. The Court held, that the substance of the covenant, and primary intention of the parties, were, that the ship should perform the voyage, and not that the ship should sail with the next wind which changes every hour (*l*).

A shipowner brought an action for stipulated freight, against a merchant who had hired a ship upon a charter-party, in which it

(*k*) *Johnson v. Greaves*, 2 Taunt. 341. *v. Allnutt*, 1 M. & S. 39.

See also on the subject of license *Siffkin* (*l*) *Constable v. Cloberie*, Palmer, 397.

was covenanted that the ship should take in it's full load of timber, with all possible expedition at *Riga*, and should thence sail "with the first favourable wind" direct to *Portsmouth*. The ship arrived at *Portsmouth* and delivered her cargo, which was accepted by the merchant, who refused to pay the stipulated freight under the allegation that the ship had not sailed direct from *Riga* to *Portsmouth*, but had unnecessarily put into *Copenhagen*, where she was detained until that place surrendered to the *British* arms, and in consequence of which deviation he had been obliged to have fresh insurances on the cargo, insisting that the special contract was avoided by the deviation, and that the master could only be entitled to a reasonable compensation for the conveyance of the cargo, in the estimation whereof, allowance should be made for the expense incurred by his fault. But Lord *Ellenborough* said, "I am of opinion that this covenant to sail with the first favourable wind direct to *Portsmouth*, was not a condition precedent, and that the defendant having accepted the cargo, must pay the stipulated freight. To hold that any short delay in setting sail or trifling departure from the direct course of the voyage, would entirely destroy the plaintiff's right to be remunerated, would indeed be going '*inter apices facti*,' here there is a specific agreement for specific freight,—the defendant must bring his cross action for any loss he may have suffered from the default of the plaintiff" (m).

The charterer of a ship (n), had covenanted to load and dispatch her from *Tobago*, so that she might sail with the convoy appointed to depart from thence on the 1st of *August*. The ship arrived in *Tobago* on the 8th of *July*, was ready to take in the homeward cargo on the 14th, and might have taken in her whole cargo within a week, if it had been ready. On the 22nd of *July*, part only of the cargo having been shipped, the convoy sailed, and the captain considering himself bound to consult the safety of the ship, refused to delay his own departure and sailed with it. In answer to an action by the ship-owner for the freight agreed to be paid by the charter-party, the merchant contended that his contract was to have a cargo ready by the 1st of *August*, and that it would have been ready by that day. But Lord *Ellenborough* said, "I think the captain was at liberty to sail from *Tobago*, on the 22nd, the day when the convoy passed that Island. The covenant must receive a reasonable construction. Had the ship

(m) *Bornman v. Tooke*, 1 Camp. 377.

(n) *Thompson v. Inglis*, 3 Camp. 428.

See also *Davidson v. Gwynne*, 12 East, 381.

not arrived in time to be loaded by the 22nd, the case would have been different; but as she was ready to take in goods for the homeward voyage on the 14th of *July*, the charterers were bound to have supplied her with a full cargo, before the time when the general *West India* convoy passed by the station where she lay. Even if the captain might have been able afterwards to have overtaken it, he was not bound to wait for the convenience of parties, as he must thereby have increased the risk of capture."

In a charter-party for a period of time at a certain monthly freight, to be paid at particular times therein-mentioned, it was stipulated that the vessel should be navigated by fifty persons, and such further number not exceeding one hundred, as the merchant should require, and that he should make an allowance to the owner for the expense of the men beyond fifty; two calendar months' allowance for such men to be added to the first payment of freight; but the residue of such allowance not to be paid until the ship's discharge or return from her first intended voyage. An additional number of men were employed at the merchant's request, and after the ship had been in his service for about ten months, she was accidentally burnt in the *West Indies*. The merchant contended that he was not bound to pay the allowance for more than the first two months. But the Court held, the loss of the ship to be a discharge from his employment within the meaning of this contract, and he was compelled to pay the allowance up to the time of the loss. "The defendants," said Lord *Ellenborough*, "contend that the stipulations in the charter-party, which fix the terms for paying the freight, make the right to the portions of freight payable at those times, depend upon the *then* safety of the ship; and that the loss of the vessel before any one of those periods destroys the right, except for such freight as was previously payable. It is to be remembered, however, that the charter-party stipulates that the defendants shall pay a given freight *per calendar month*; and the times fixed for its actual payment can only be considered, as postponing for the defendant's convenience, the actual payment of a sum then due to a future period, not as creating a contingency, whether it should ever be paid at all. Each month's freight, therefore, was earned, and became completely due at the end of each month; and it was nothing but the actual payment that was postponed" (o).

(o) *Havelock v. Geddes*, 10 East, 555.

In the case of *Moorsom v. Page* (p), the ship *Lavinia* was let to freight by the plaintiff to the defendant for a voyage from *Rio de la Plata* to *London*; the plaintiff covenanted to "receive and take on board the said ship, a full and complete cargo, consisting of copper, tallow, and hides, or other goods, but not more than fifty tons of copper and tallow, nor more than fifteen of such fifty tons to consist of copper," and the defendant undertook to furnish and provide for loading "on board the said ship, a full and complete cargo of copper, tallow, and hides, or other goods as above mentioned, and to pay freight for the said cargo as follows:—for copper, the sum of 6*l.* sterling per ton; for tallow, the sum of 2*l.* sterling per ton; for hides, the sum of one penny half-penny sterling per pound, all net weight at the king's beam, and for all other goods in proportion thereto."

It appeared that the defendant had provided for the ship a quantity of tallow, and as many hides as she chose to take in, but that he refused to let her have any copper. It was in consequence, necessary for her to keep in her ballast, the place of which might have been supplied by the copper, and the amount of the freight which she carried was less than if copper had been supplied. The plaintiff contended, that under the covenant to load the ship, the defendant was bound to furnish her with a properly assorted cargo, so that she might be entirely filled with goods, on which freight would be due, and that he was, therefore, liable in damages for a sum equal to the freight which would have been earned, had fifteen tons of copper been put on board.

"The parties," said Lord *Ellenborough*, "very likely intended that copper should necessarily form a part of the cargo, but they have not said so. The covenant leaves a latitude to the freighter to furnish a cargo of copper, tallow, hides, 'or other goods;' therefore, if the ship had as large a quantity of tallow and hides as she could take on board, I think the covenant has been performed."

The case of *Irving v. Clegg* (q), was decided upon the same principle.

By charter-party, it was agreed that the ship *Eliza*, then lying at *Bristol*, and of the burthen of three hundred and twenty-three tons or thereabouts, should take in and receive all such lawful goods as might be sent alongside, but not exceeding three hundred tons of dead weight; and being so loaded should proceed

(p) 4 Campb. 103.

(q) 1 Bing. N. C. 53.

therewith to *Batavia*, and there, or at *Sourabaya*, discharge the same; and being unloaded, should at a port or ports in *Sumatra* or *Java*, both or either, load a full and complete cargo of merchandize, the fore-cabin or dining-room included, to be filled with light goods, which the defendants bound themselves to ship, not exceeding, &c.; and being so loaded, should proceed to *London*, *Rotterdam*, or *Antwerp*, and deliver the same on being paid freight for the outward cargo 300*l.*, and for the homeward cargo at and after the rate of 4*l.* 15*s.* per ton of twenty cwt. for sugar, coffee and rice, and for pepper at eighteen cwt. to the ton, net weight at the king's beam, the tare of the sugar not to exceed six per cent. And for all other goods, except those already mentioned, in just and fair proportion, according to the *East India Company's* scale of tonnage. It was further agreed, that one hundred tons of rice or sugar should be shipped, previous to any other part of the loading, to ballast the vessel, and keep her in proper trim for the voyage. Upon this charter-party it was contended, that the defendants should have shipped a full cargo, so assorted and so complete as to render it unnecessary for the plaintiff to ship any ballast. It was proved, that though the ship was fully loaded, they had stowed such a proportion of pepper, as to render it necessary for the master to ship thirty-six tons of stone ballast, for the safety of the vessel, in addition to the one hundred tons of rice. Lord Chief Justice *Tindal* said, "Had it not been for the insertion of the stipulation at the end of the charter-party, it would have been clear that, under the agreement by the freighter to furnish a full and complete cargo of merchandize, with the subsequent enumeration of the rates of freight for sugar, coffee, rice, pepper, "and all other goods," the freighter would be at liberty to load the ship with whatever goods, and in whatever proportion he thought proper; and that the loss of freight, if any loss arose from the necessity of putting ballast into the ship, would be a loss that must fall on the owner. The question arises upon that stipulation by which the merchant undertakes to ship one hundred tons of rice or sugar previous to any other part of the lading, "to ballast the vessel, and keep her in proper trim for the voyage." And the question is, whether, under this stipulation, the freighter is bound to make up a full cargo of other articles, in such proportions that freight shall be payable for the whole tonnage of the ship, or whether he may load a full cargo of the lightest commodities; and if

any ballast is then wanting, it must be put in by the master, and occasion, *pro tanto*, a loss of freight? We think the latter is the true construction of the agreement. In the first place, it is consistent with the very terms employed by the parties; and it is some violence to those terms to hold them to extend to one hundred and thirty-six tons, or to any other quantity that might be found necessary to ballast the ship. In the next place, it is the duty of the owner to find proper ballast for the ship, in order to make her trim for her voyage. The agreement in question, therefore, is an agreement made for the benefit of the owner, as it relieves him from so much of the obligation, as is usually thrown upon him, and ensures him a freight for what would otherwise be unproductive. But it leaves the owner still liable to that obligation, except so far as the special agreement will extend, which here, by the very terms of it is to one hundred tons only."

11. That the Courts will construe charter-parties with reference the usage of trade in general, and the peculiarities of the trade to which the contract relates, will appear from the following cases.

It was agreed (q) by charter-party that a vessel should have ninety running days, and ten days of demurrage, to commence from her arrival at *Whidah*, in *Africa*, *being ready to unload, and having received pratique*. The plaintiff in his declaration alleged, that although the vessel on the 24th *August* was at *Whidah*, ready to unload, and *had received pratique*, the defendant did not, within ninety days, commencing on her arrival there, and being ready to unload and receive pratique, unload and load the vessel, but wrongfully detained her beyond the running days and days of demurrage. The defendant pleaded, that the vessel was not ready to unload, and did not receive pratique for a long time after her arrival at *Whidah*, viz. for a time equal to that of the alleged wrongful detention.

It appeared in evidence that there was no quarantine establishment at *Whidah*, nor any means of formally granting pratique, but that the vessel was in fact at liberty to unload on the 14th of *August*.

The Court held, that the allegation that the vessel had received pratique was sufficiently borne out by proof that she was at *Whidah*, *ready and at liberty* to unload.

(q) *Balley v. De Arroyave*, 7 Ad. & Ell. 919.

In an action (r) on a charter-party by the plaintiffs to the defendants, of the ship *Edward Lombe*, from *London* to *Madras* and the *Cape of Good Hope*, and thence to *Bombay* and back, the plaintiff claimed a compensation in damages against the defendant, for not loading the ship with a cargo of cotton at *Bombay*. It appeared in evidence, that instead of proceeding direct by the usual course from the *Cape of Good Hope*, the captain made a deviation to the *Mauritius*; that the vessel arrived at *Bombay* six weeks later than it would have done, had it proceeded in the usual course, and that the defendant's agents, in consequence of the deviation, refused to find a cargo. The jury were directed to consider whether the deviation was such as to have deprived the freighter of the benefit of his contract. "Inasmuch," said *Tindal*, C. J., in his direction to the jury, "as the freighter might sue the owner, and recover damages for any ordinary deviation, he could not, for such a deviation, put an end to the contract. But if the deviation was so long and unreasonable, that in the ordinary course of mercantile concerns, it might be said to have put an end to the whole object the freighter had in view, in chartering the ship, in that case the contract might be considered at an end."

The jury found for the defendant, and the rule for a new trial, on the ground of misdirection, was discharged.

Thus, in the case of *M'Andrew v. Adams* (s), the defendant, by charter-party, agreed to go in ballast from *Portsmouth* to *St. Michael's*, and bring back a cargo of fruit direct to *London*. The charterer was to be allowed thirty-five running days for loading and unloading, to commence on the 1st of *December* then next; and if the vessel did not arrive at *St. Michael's* by the 31st of *January*, 1833, the charterer was to be at liberty to rescind the charter-party.

In the fruit trade, the early ships sail about the end of *October*, and arrive in *London* about the end of *December*; and it is advantageous to be early in the market. This charter-party was entered into on the 20th of *October*. The usual length of the voyage is a fortnight or three weeks; the time consumed in loading and unloading, about a week; so that, if the defendant had sailed direct for *St. Michael's* about the time he executed the charter-

(r) *Freeman v. Taylor*, 8 Bing. 124.
See also *Mount v. Larkins*, 8 Bing. 108;
Davis v. Garratt, 6 Bing. 716; *Palmer*

v. Marshall, 8 Bing. 318.

(s) *M'Andrew v. Adams*, 1 Bing. N. C. 29.

party, he might reasonably have been expected to deliver his cargo in *London* by the 1st of *January*. Instead of proceeding direct to *St. Michael's*, the defendant made an intermediate voyage to *Oporto*, returned to *Portsmouth*, sailed again for *St. Michael's*, arrived there before the 31st of *January*, was loaded with oranges, and arrived in *London* on the 1st of *February*, by which time there was a glut of oranges in the market, and the price had fallen since the end of *December*, when the *London* orange season commences, 10s. 6d. a box.

It was contended for the defendant, that the stipulation that the plaintiffs might rescind the contract if the defendant did not arrive at *St. Michael's* by the 31st of *January*, led to the inference that the defendant's engagement would be satisfied if he arrived by that day; and that, if he did so arrive, he had a right, in the interval, to employ his vessel as he pleased. But *Tindal*, C. J., said, "The broad question is, whether, upon the construction of the charter-party, there has been unnecessary delay in commencing the voyage to *St. Michael's*? Now, looking at the contract, I think, with a view to the object of the voyage, its commencement was delayed an unreasonable time. I do not lay stress on the stipulation for proceeding in ballast, any further than it seems to refer to a voyage, in which the master shall not lie by to take in a cargo, which might delay the ship on her voyage. As the parties have stipulated that the lay days shall commence on the 1st of *December*, it may be inferred that they contemplated the voyage to *St. Michael's* should terminate by that day. If, indeed, by any accident or unforeseen cause, which should excuse the master, the vessel should arrive later, the charterer would have no just cause of action; but the intention at the time was, that the object of the voyage should, if possible, take effect from the 1st of *December*. That it might have taken effect from that time is clear, for the voyage usually lasts a fortnight or three weeks, and the vessel sailed from *Oporto* on the 7th of *November*. The instrument then goes on,—'That in case the vessel should not be arrived at *St. Michael's*, and in readiness to receive her cargo by the 31st of *January* next, it shall be optional with the agents of the affreighters, whether they load or not; and in case they decline loading, the charter-party shall be null and void.' That was to give the charterer the option of repudiating the contract, if the vessel should arrive too late for any useful purpose,

although, if she had been detained by any justifiable cause, he might have no right of action against the owner. All the evidence in the cause goes to show, that the intention of the parties in entering into this contract was such as I have described; the course of the trade in *London*, which requires a speedy voyage, and gives advantages to those who are first in the market; and the letter of the 9th of *November*, in which the plaintiffs say, 'In having taken the *Swallow* to *Oporto*, with passengers, on her way to *St. Michael's*, instead of proceeding direct, we consider you to have deviated from the due performance of the charter-party entered into with us; and we hold you liable for all loss or injury which may arise to the parties interested, in consequence of your not proceeding direct.' I think, therefore, that as the commencement of the voyage was, without any justifiable cause, delayed till the 6th of *December*, an action lies for the plaintiffs." §

A charter-party, for a voyage with the ship *Anne* (t), from *London* to *Petersburgh* and back, after the usual clauses for unloading and loading at *Petersburgh*, and payment of freight at a certain rate per ton of the ship's capacity, contained the following special stipulations; viz. the master covenanted, that if political or other circumstances should arise to prevent the shipping a return cargo, or discharging the outward cargo, the merchant or his agents should be at liberty to detain the ship at *Petersburgh* for forty days in the whole after her arrival there; and the merchant covenanted, that after the ship should have remained there for that time without delivery of the cargo, the master should be at liberty to return with his vessel to *London*, or any other port in *England*; and that he would pay him 2500*l.* immediately upon the arrival of the ship at *London*, or any such port in *England*. In fact, the *Russian* government refused to permit the cargo to be landed at *Petersburgh*, and the master, intending to act for the best, after waiting the forty days, proceeded to *Stockholm*, and there sold the cargo to some disadvantage, and took in other goods, which he brought to *London*, upon freight. It was contended that the master had no right to the 2500*l.*, because he had not returned directly from *Petersburgh* to *England*; but the Court of King's Bench decided that he was not bound so to do, considering that such a construction of this instrument might, under

(t) *Puller and Another v. Stainforth*, 11 East, 232.

circumstances, be very inconvenient to both parties, and determined that he was entitled to the stipulated sum, after a deduction for the freight earned in bringing the goods from *Stockholm*. This matter came before the Court in an action brought by the merchant against one of the underwriters on a policy of insurance, which he had effected upon this adventure; it does not appear what was the amount of the freight earned by bringing the goods from *Stockholm*, but it may be presumed to have been less than the 2500*l.*, nor does it appear upon what terms the merchant had settled his account with the master of the ship, and probably the account had not been settled. It should also be observed, that the master had taken upon himself to sell the goods at *Stockholm*, which he had no right to do, and had not strictly performed his part of the contract, which seems to have required that he should bring them back, although he was not expressly and in terms required to do so; and perhaps the sale of the goods enabled him to obtain the cargo that he brought back.

Upon another charter-party, in similar terms, a question afterwards arose between the master and the merchant. This was on the ship *Resolution*; the money to be paid on the contingency before mentioned was 2700*l.*, with 10*l.* per cent. thereon, and one hundred guineas as a gratification to the master. A small quantity of lead was the only thing taken out from *England*. The ship not being allowed to unload at *Petersburgh*, and no cargo being offered, nor directions given on the part of the merchant, the master, after waiting the *forty* days, sailed to *Stockholm*, and there took in a cargo of hemp, which he stowed upon the lead, and returned with both to *London*, and there delivered the lead to the merchant. Some expense was incurred in relation to the lead; and a considerable expense in obtaining and waiting for the cargo of hemp. The clear profit of bringing this cargo was about 2400*l.*; the sums payable under the charter-party, if the contingency had not happened, and the outward cargo had been delivered and a homeward cargo brought back, would have been about 4000*l.*: the master offered to settle the account with the merchant by charging him with what would have been due, if he had loaded the ship homeward, and allowing him the benefit of the clear earnings that had been made; thus demanding from him about 1,600*l.* But *this he refused*, and insisted that the earnings should go in diminution of the 2700*l.* &c.

and that the master was therefore entitled only to about 600*l*. Upon this the master brought an action in the Court of Common Pleas, upon the charter-party, for the non-payment of the 2700*l*. with the per centage and gratuity. At the trial the jury gave a verdict for those sums. An application was made to the Court to reduce the verdict to the sum that had been previously offered by the merchant: but, after argument, the verdict was allowed to stand. The decision of the case on the ship *Anne* was strongly urged as an authority in support of the application: in support of the verdict it was argued that this payment of the 2700*l*. &c. was the stipulated price of a mutual release from the contract; and the Court, adverting to the particular terms of this instrument, considered that the parties had thereby fixed and ascertained, by their own agreement, the sum to be paid in the event that had happened; and although it was thought that the master was bound to bring back the lead, yet it was held that he was at liberty to bring back other goods also for his own benefit, if he could obtain them (v). By this decision, the master, in effect, received more than he had originally claimed when he made the very fair and equitable offer before mentioned; and more than he would have received if the merchant had loaded the ship at *Petersburgh*: but as the merchant had rejected the offer, the parties stood before the Court upon their legal rights.

12. It is interesting to remark the coincidence of this decision of the Court of Common Pleas with the sentiments of two learned foreigners on an article of the *French Ordinance*, somewhat similar to the particular agreement of these parties. In the first place it will be recollected, that the parties had fixed a sum to be paid in the event of the merchant's not loading the ship, and that this sum was about half of what the master would be entitled to if he had brought a cargo. The case did not stand upon a general covenant to load the ship; the proper remedy for a breach of such a covenant, according to the law of *England*, would be an action for damages; and in estimating the damages, the jury would make a deduction for such benefit, if any, as the master might

(v) *Bell v. Puller and Another*, 2 Taunt. 285. The judgment in this cause was questioned incidentally in the Court of King's Bench in an action depending on one of the policies of insurance effected by Messrs. Puller, but the Court thought

the insurers bound by this judgment. None of the learned judges questioned the propriety of the decision; Mr. Justice Bayley expressly said he thought the judgment right. See *Puller v. Halliday*, 12 East, 494.

derive from bringing the goods of other persons, but if he should have been obliged to return empty, they would award damages equivalent to the sum that would have been payable by the merchant for a full cargo: taking care on the one hand that the master should lose nothing, and on the other hand that he should gain nothing, by the breach of the merchant's contract. And this agrees with the opinions of *Valin* and *Pothier* on one of the articles of the *French Ordinance*, which imports, that "the merchant, who does not load the quantity of goods mentioned in the charter-party, shall nevertheless pay the freight as if the whole had been laden" (x). Notwithstanding this rule, they say, if the master procures goods from other persons, the freight that he derives from them shall go in diminution of the sum to be paid by the merchant (y), for the Ordinance awards the whole to him only by way of indemnity (z). But there is another article of the Ordinance, which, as a general rule, is very extraordinary. "If the contract be for a certain quantity of goods," not the entire ship, "the merchant, who will withdraw his goods before the ship's departure, may cause them to be unloaded at his own expense, on payment of a moiety of the freight" (a). This is analogous to the particular stipulation in the charter-party of the *Resolution*. The reason of this article, says *Valin* (b), is, that the master may find other goods to replace those that are withdrawn, and a moiety of the freight is considered as a sufficient recompence for the delay that may be occasioned; from whence it follows that the master shall have the moiety without deduction, although in the end he may obtain a full cargo. *Pothier*, with more precision, says, The moiety of the freight, which the merchant pays in this case, being *the price of the risk* that the master runs of not being able to let to other persons the part of his ship which the merchant's goods ought to occupy, or of not finding an equally valuable freight, he ought to have the profit of this moiety, and to retain it, although he may be able to let out this part for an equal or even a greater freight; for having run the risk of losing the freight of this part, if he had not been able to let it, he ought to have the profit of it. The master, by relinquishing, under this

(x) Ordonnance de la Marine du mois d'Aoust, 1681, liv. 3, tit. 3, Fret. art. 3.

(y) Pothier, Charte-Partie, num. 76.

(z) 1 Valin, p. 642.

(a) Fret. art. 6.

(b) 1 Valin, p. 646.

obligation of law, a moiety of the freight to the merchant, acquires the right of employing for his own benefit the part that had been let to him (c). So in the case of this charter-party, the master having agreed to accept, as a substitute for his general right to an equivalent in damages, in case the merchant should not load the ship, a fixed sum short of the price of a full cargo, by which he might be a loser if he could not obtain a cargo elsewhere, was entitled to the whole of the stipulated sum as the price of the risk, if he had the good fortune to find other persons who would load his ship.

13. § Whether or not a particular covenant by one party be a condition precedent, the breach of which will dispense with the performance of the contract by the other, or an independent covenant, is a question to be determined according to the fair intention of the parties, to be collected from the language employed by them (d). An intention to make any particular stipulation a condition precedent should be clearly and unambiguously expressed. The general rule (in the words of Lord *Ellenborough*, (e) is, that unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered a condition precedent, but as a distinct covenant, for the breach of which the party may be compensated in damages.

In *Ritchie v. Atkinson* (f), the master and the freighter of a vessel of four hundred tons, mutually agreed in writing that the ship should proceed to *St. Petersburg*, and there load from the freighter's factors a complete cargo of hemp and iron, and proceed therewith to *London*, and deliver the same, on being paid freight for hemp 5*l.* per ton, for iron 5*s.* a ton, &c. The master, under a reasonable and well-grounded apprehension of an embargo, sailed from *St. Petersburg* with a cargo of hemp, little more than half of what the vessel could have carried, though there was as much hemp of the defendant's lying in lighters alongside of the vessel, as would have completely loaded her. The vessel arrived at *London*, and delivered her cargo there to the defendant, who refused to pay the freight, on account of the deficiency of the cargo. Lord *Ellenborough* said, "If the delivery of a complete cargo were a condition precedent to the recovery of

(c) *Charte-Parte*, num. 78.

(d) *Havelock v. Geddes*, 10 East, 555.

(e) *Davidson v. Gwynne*, 12 East, 361.

(f) 10 East, 295.

any freight, no doubt the defendant would be entitled to require the strictest performance of it; but the question is, whether it be a condition precedent? and that depends not on any formal arrangement of the words, but on the reason and sense of the thing, as it is to be collected from the whole contract. The rule was well laid down by Lord *Mansfield*, in *Boone v. Eyre*, that where mutual covenants go to the *whole* of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where the covenants go only to a *part*, there a remedy lies on the covenant, to recover damages for the breach of it; but it is not a condition precedent. There is no case where the delivery of less than a complete cargo has been held not apportionable. Where, as in *Smith v. Wilson* (g), the freight is made payable upon an indivisible condition, such as in that case, the arrival of the ship with her cargo at her destined port of discharge; such arrival, &c. must be a condition precedent, because it is incapable of being apportioned; but here the delivery of the cargo is in its nature divisible, and therefore I think it is not a condition precedent; but the plaintiff is entitled to recover freight in proportion to the extent of such delivery, leaving the defendant to his remedy in damages for the short delivery. And all the cases of conditions precedent have been where the thing to be done was a strict indivisible condition."

In the case of *Havelock v. Geddes* (h), the ship-owner had covenanted in the charter-party, that the ship should, at his expense, be *forthwith* made tight and strong, and fitted, &c. for a voyage for twelve months to foreign parts. The ship sailed from *London* with a cargo put on board by the merchant. Upon her return, the merchant refused to pay the freight, alleging that nothing was due, because the owner had not *forthwith* duly made his vessel tight and strong, in consequence of which she had been compelled to stop at *Portsmouth* to repair, and he lost the use of her for a long time, and his goods were injured. But this was held to be no legal answer to the demand,—not even for the period of her stay at *Portsmouth* to repair,—the merchant having accepted the ship, and taken her into his employment, and put his goods on board, Lord *Ellenborough* said, "Had the plaintiff's neglect precluded the defendants from making *any* use of the vessel, it

(g) 8 East, 437, and see *post*, chapter on freight,

(h) 10 East, 555.

would have gone to the whole consideration, and might have been insisted on as an entire bar, because the consideration for the defendant's covenant to pay the freight would then have failed *in toto*; but as the defendants have had some use of the vessel, notwithstanding the plaintiff's neglect, the plaintiff's covenant is to be considered as going to a part only, the consideration has not wholly failed, and the covenant cannot be looked upon as having raised a condition precedent, but merely gives the defendants a right, in a counter action, to such damages as they can prove they have sustained from his neglect."

The cases of *Constable v. Cloberie* and *Bornman v. Tooke* (g), above cited, were decided upon the same principles.

In the case of another charter-party for time at a monthly payment, whereby the master covenanted, that immediately after being loaded and dispatched, he would (wind and weather permitting) sail with the first convoy for the intended voyage. The voyage being in fact performed, it was held that the hire might be recovered, although the master had neglected to sail with the first convoy (h).

In an action of covenant brought by the owner of the ship *Concord* against the freighters, it appeared that by the charter-party the vessel was to proceed by *Cagliari* to *Naples*, and there make a delivery of her outward cargo; and *having so done*, she was to take on board a homeward cargo, and proceed therewith to *London*. The merchants covenanted that they would find and provide, as they did warrant and assure to the plaintiff, a full and complete homeward cargo; and they undertook to pay freight, at the rate of 15*l.* by the ton, and that 1750*l.*, part thereof, should be paid on delivery of the outward cargo, which was to be considered as earned and due for outward freight, by a bill of exchange, and the remainder of the freight in equal moieties, within a certain time after the ship should be reported inwards at *London*. The ship arrived at *Naples* with the outward cargo, and while waiting there to deliver, it was seized and taken, together with the cargo, by order of the persons exercising the powers of government there, and the cargo landed by order of the same persons; but the master put into possession of the ship, for the purpose of loading his homeward cargo. The merchants did not furnish a

(g) *Ante*, 234, 235.

(h) *Davidson v. Gwyne*, 12 *East*, 381.

homeward cargo, and contended, that by reason of the outward cargo not having been delivered to them they were not bound to do so, nor to pay the 1750*l.* as the outward freight. The owner, on the contrary, claimed the 1750*l.*, and also compensation in damages for not being furnished with a homeward cargo. It was held that he was not entitled to the 1750*l.*, because he had not delivered the outward cargo to the merchants, but that he was entitled to a compensation for the loss of the homeward cargo,—the delivery of the outward cargo not being a condition precedent to his right to the homeward cargo. “The covenant from the freighters,” said Lord *Ellenborough*, “contains no words which import to make the delivery of the outward cargo a condition precedent: they covenant generally, and without qualification, that at *Naples* or *Gallipoli* they would find and provide, as they did thereby warrant and assure to the owner, a full and complete cargo. It is contended, however, that from the wording of the owner’s covenant, this condition precedent is to be implied; but it does not appear to us that the words ‘having so done’ would have been any excuse to the plaintiff for not taking in the cargo; and admitting that they would, it by no means follows that they would afford one to the defendants. The words seem rather intended to mark the time when the plaintiff’s obligation to receive a homeward cargo should attach, viz. when his ship, from being clear of one cargo, should be in a condition to receive another; and they are unaccompanied with those express words of condition which would naturally have been used, had there been any intention of giving the plaintiff an option of terminating the contract and refusing a homeward cargo, if he should have been prevented by any accident from delivering the outward cargo” (i).

By charter-party between the ship-owners and freighters, the ship-owners covenanted to take on board six pipes of brandy at *Havre*, and to proceed therewith to *Terceira*, and there take on board a cargo of fruit, or other goods, as the freighters might think fit, and proceed to *London* or *Bristol*, as might be ordered by the freighters, and there make a right and true delivery of the fruit. The freighters covenanted to pay certain freight for the fruit and the brandy, (the freight of the brandy to be taken out in

(i) *Storer v. Gordon*, 3 M. & S. 308.

fruit at *Terceira*,) and guaranteed the ship a full home cargo. Upon this charter-party the Court of Common Pleas determined, that the covenant to take the brandy to *Terceira* was not a condition precedent, but an independent covenant; and therefore, (the owners, in an action of covenant against the freighters, for not having put a full cargo of fruit on board at *Terceira*, having averred general performance), the declaration was held good on special demurrer. Lord Chief Justice *Dallas* said, "The covenant here goes only to a part of the consideration; the breach of it may be paid in damages, and the remedy of the defendants is, therefore, by action. The doctrine in *Boone v. Eyre*, on which this last proposition is founded, has all the weight which some of the greatest names in Westminster Hall can give it. That doctrine was laid down by Lord *Mansfield*; it was next recognised by Lord *Loughborough*, and formed the ground of the determination of the Court of Common Pleas in the case of the Duke of *St. Alban's v. Shore*. It was then sanctioned by Lord *Kenyon*, and the rest of the Court of King's Bench, in the case of *Campbell v. Jones*, and was afterwards eulogised by Lord *Ellenborough*, in referring the judgment of the Court in *Havelock v. Geddes*." §

14. The merchant, however, may, if he think proper, by special and particular provision, make any stipulation, such as the arrival of the ship, or even the arrival of another ship a condition precedent, to the performance of his covenants in the charter-party. If an intention to do so be manifest from the language employed, the law will give effect to it, and he should guard against a construction at variance with his purpose, by the use of terms excluding all latitude of interpretation; for although the contract by charter-party is in general of that kind which the lawyers call reciprocal, that is, mutually obligatory upon each party, nevertheless the parties may, by particular clauses, render it obligatory upon one, and optional on the other (*j*).

Thus in *Shadforth v. Higgins (k)*, where a ship was freighted to go in ballast to *Jamaica*, and bring home a cargo from thence, and the freighter undertook to provide a full cargo for her in time for the *July* convey, *provided she arrived in Jamaica by the 25th day of June*, but the vessel did not arrive till some days afterwards; it was held that such fixed time was a condition pre-

(*j*) *Fothergill v. Walton*, 8 Taunt. 4 Price, 36.
516. See also *Deffrell v. Brockelbank*, (*k*) 3 Camp. 385.

cedent, and was to be considered as the farthest time which the party would grant, and that under these circumstances, the merchant freighter was entirely discharged from his contract to furnish a cargo.

The master of a vessel (*D*), bound on a voyage to the island of *Madeira*, covenanted by a charter-party, that he would directly, as wind and weather would permit, after the discharge of his cargo at that island, sail and proceed to *Winyaw* in *South Carolina*, or as near thereto as he could safely get, and there stay forty running days, from the time of such arrival, if not sooner dispatched, and load his ship with such rice and other goods as the merchant's agents should tender to be laden; in consideration whereof, the merchant agreed to pay him freight at the rate of 4*l.* 10*s.* per ton for every ton, delivered at the port of *London*, and also two-third parts of port-charges, pilotage, &c. The charter-party contained the following proviso:—"That if the said ship should not be arrived at *Winyaw* aforesaid by the first day of *March* next ensuing the date of the said charter-party, then and in such case, it should be in the option of the merchant, his factors or assigns, on the said ship's arrival at *Winyaw*, either to load the said ship on the terms aforesaid or not, at the then current freight given to ships loading at *Winyaw* for the voyage aforesaid, or to refuse the said ship entirely; so always that such the intention of the said merchant, his factors or assigns, was declared to the master of the said ship within forty-eight hours after his application to the factors or assigns of the said merchant at *Winyaw*." On this charter-party the merchant brought his action; alleging, first, that the ship did not sail and proceed to *Winyaw* or as near thereto as she could safely get, in order to load, &c.; but that the master (the defendant) wilfully absented himself therefrom. In defence to the action, the master pleaded that he did proceed with all convenient speed and sail to the island of *Madeira*, but by reason of contrary winds and bad weather, and from no other cause, was prevented from arriving there till the 16th of *February*, so that it was impossible for him to discharge his outward bound cargo at *Madeira*, and after such discharge to arrive at *Winyaw* by the 1st of *March*, the facts of which plea the plaintiff admitted to be true, and the question,

(1) *Shubrick v. Salmond*, 3 Burr. 1637,

therefore, was, whether or not, as the merchant had his option to load the ship or not, in the event of her arrival at *Winyaw* after the 1st of *March*, the master having been unavoidably delayed in the previous voyage by no fault of his own, so as to render his arrival at *Winyaw* by that time impossible, was bound to sail thither on the chance of the merchant's choosing to give him a freight when he should happen to arrive? The Court held, that by the terms of the charter-party, the master had bound himself to do so, and Lord *Mansfield* said, "The plaintiff wanted a ship at *Winyaw* in *Carolina*, to load with rice, and therefore, he covenanted with the defendant to freight the ship there, and the defendant covenants absolutely to go thither, and in order to quicken the ship's arrival, there is a proviso, that if he gets there by the 1st of *March*, he is to be certain of a freight; but if he does not arrive there before the 1st of *March*, then the plaintiff was to declare in forty-eight hours whether he would freight the ship or not. The defendant, therefore, thereby became the insurer of the risk of his getting there before the 1st of *March*, in which event he was sure of a freight, but still he had a general chance of getting a freight, even though he should not arrive till after that time. The words are positive and express *that he should go thither*. The parties plainly meant that the ship was to go thither, and the consideration fails by his not going."

Another charter-party (*I*), whereby it was agreed that the vessel should sail for *Sidney* in *New South Wales*, where, having discharged her cargo, she should proceed to some port on the coast of *Malabar*, and there take in a home cargo from the freighter's agents, with the usual covenant on the part of the freighter to load a full cargo and to pay freight at a certain rate, contained a further proviso, "That in case the vessel should not be arrived at her port of lading, and be ready to take in cargo on or before the 28th day of *November*, unless she should have been prevented by stress of weather, or other unavoidable impediment, then it should be at the option of the freighter to load her with the home cargo or not, as he might think proper." The vessel not having arrived at the port of loading on the *Malabar* coast until some time in the month of *January*, the freighter refused to put a cargo on board: and an action being brought against him by the owner for

(1) *Granger v. Dent, Lloyd & Welsby*, Mer. Cases, 270.

the breach of his covenant in this respect, the question raised by the pleadings was, whether, in the words of the exception to the proviso, the vessel had been prevented from arriving by stress of weather or other unavoidable impediment? A verdict was found for the defendant, and Lord Chief Justice *Tindal* directed the jury, "that although the words 'unavoidable impediment' imported primarily something of the *vis major*, yet in their present application, they might be fairly considered as denoting such an obstruction, as a man could not by any reasonable degree of foresight have prevented, and did not therefore demand from the owner or master greater efforts than were usual, and in the ordinary course."

. The ship *St. Patrick* (m), was chartered to sail from *London*, in ballast, to *Cadiz*—remain there fifteen days, and thence proceed to *Guyaquil* or elsewhere as directed; there to lay one hundred and twenty running days for cargo; and the charterers agreed that at such port of destination they would send alongside the vessel, all such lawful goods as they might think proper to ship, and dispatch her to her home port. A proviso was added, "That in the event of the non-arrival of the ship or vessel called the *Grant*, *Hogarth* master, (chartered, and then on her voyage to *St. Blas de California*,) at that port, then in such case that charter-party and every clause of agreement therein contained should, in case no shipment should have been made under it, cease, determine, and be utterly void to all intents and purposes whatsoever." The *Grant* did arrive at her outport, but not until long after the expiration of her lay days; no cargo was furnished to the *St. Patrick*, and an action being brought by the owner, it was held, that giving to the terms of the proviso a fair and reasonable interpretation, the charterers were released from their engagements, and that the action could not be sustained. Lord *Tenterden* said, "I left it to the jury to say, whether the delay of the *Grant* had been occasioned by the default of the defendants? and observed, that if it had, her non-arrival would not be a sufficient answer to the action. The next point is the construction of the charter-party. My opinion was, that it meant such an arrival of the *Grant* as would answer the purposes of the parties to the

charter-party. It is said that the only limit is arrival in the course of that voyage, but that might be so late as not to answer the purposes plainly designated by this instrument. Looking at that instrument alone, I still think as before, that the arrival of the *Grant*, in order to satisfy the proviso, should have been within the running days, or the twenty additional days, during which the ship might be detained on demurrage, if the captain was required to wait so long."

15. The charter-parties of the *East India Company* usually contain the following clauses (o) :—"As touching the freight to be paid or allowed by the Company, it is agreed, and the Company covenant with the said part-owners, that the Company shall and will, in case and upon condition that the ship performs her voyage, and arrives at *London* in safety, and the said part-owners and masters do perform the covenants on their part, and not otherwise, well and truly pay and allow the freight herein mentioned."

"It is hereby agreed, that in case the ship does not arrive in safety in the river *Thames*, and there make a right delivery of the whole and entire cargo and lading on board the said ship as aforesaid, the Company shall not be liable to pay any of the sums of money hereinbefore agreed to be paid for freight and demurrage, nor subject to any demands of the said part-owners or master on account of the said ship's earnings in freight, voyages for the Company, or on account of any other employment; any other law, practice, or custom notwithstanding."

Upon the effect of these clauses, a question arose in the case of the ship *York*, which had been chartered by the Company, and on her return home from *India* met with a violent storm off *Margate*, where she was stranded and sunk under water; by this misfortune, a great part of her cargo (being saltpetre) was lost; the principal part of the remainder, which consisted chiefly of pepper, was greatly damaged by the sea-water, but was got out of the ship by persons sent down by the Company, and brought to *London* in vessels, where a particular process was employed at a great expense by the Company, to restore it in some degree, and render it marketable. The ship, after being

(o) *Hotham and Another v. East India Company*, Doug. 272.

in a great measure unloaded, was with much difficulty raised out of the water, and arrived in the port of *London*, with a small part of the cargo still remaining on board.

The Company contended, that by the construction of the before-mentioned clauses, they were wholly discharged from the payment of any freight or demurrage whatsoever. But a special jury of merchants, before whom the cause was tried, and the Court of King's Bench, by whom the verdict of the jury was reviewed, held, that freight was to be paid for all the goods delivered, and demurrage as specified in the charter-party.

The same misfortune also gave occasion to two other questions, which arose in the same cause, upon the meaning of the following clauses in the charter-party, viz. :—

“ And if any of the homeward bound cargo shall be lost or undelivered into the said Company's warehouses at the said ship's arrival in *England* (except that no such payment shall be made if there happens an utter inevitable loss of ship and cargo, nor shall any other payment be made for such goods as shall necessarily perish, or be cast into the sea for the preservation of the ship and cargo, than by an average to be borne by ship, freight, demurrage, and cargo) the part-owners, and master, shall pay or allow to the Company the prime cost of such goods, and 30% for every 100% on such prime cost.”

“ But if any of the homeward bound cargo when delivered into the Company's warehouses in *England*, shall be found to be prejudiced, wet, or damnified, by any occasion or accident whatsoever, it shall be lawful for the Company to refuse such goods, and in such case the part-owners and master shall take them, and allow to the Company the sum which they are invoiced at, with charges, customs, and duties, and in such case the Company shall pay no charges or freight for the said goods so prejudiced, wet, or damnified, unless in case of damaged pepper, which the part-owners and masters are to allow the Company for at the current price of sound pepper in *London*, and the Company are to pay the freight and charges on such pepper, as if it were not damnified.”

“ But the said part-owners shall not be charged with any sum of money, in respect of goods damaged on board the said ship, but such as shall, by the condition and appearance of the package thereof, or by some other reasonable proof, appear to be ship-

damage (p) ; anything herein contained to the contrary thereof in any-wise notwithstanding."

Upon these clauses the jury, and afterwards the Court of King's Bench, were of opinion, *First*, that the owners were not liable to pay for goods lost or not delivered in consequence of this misfortune that had befallen the ship. And *Secondly*, that they were not liable to pay or allow for any loss upon the pepper ; and as to these points Lord *Mansfield* observed, "The question is, whether the owners are to pay for the damage occasioned by the storm—the act of God? and this must be determined by the intention of the parties, and the nature of the contract. It is a charter of freight. The owners let their ships to hire, and there never was an idea that they insure the cargo against the perils of the sea. The Company stand their own insurers ; words must be construed according to the subject-matter. What are the obligations upon the owners, which arise out of the fair construction of the charter-party ? why, that they shall be answerable for damage incurred by their own fault, or that of their servants, as from defects in the ship, or improper stowage, such as mixing commodities together which hurt one another, &c. If they were liable for damages occasioned by *storms*, they would become insurers" (q). "As to the other point, of the goods lost, the whole is one entire contract, and must be understood in a manner consistent with itself, and it never could be intended that the owners should be protected from the lesser loss and remain answerable for the greater."

The expense of saving the goods was held to be a general average, and the owners were held responsible for the whole extra expense of bringing the goods up from *Margate*.

Upon the effect of the before-mentioned clause, by which it is agreed, *that if the ship shall not arrive in safety in the*

(p) In the printed form of a charter-party, used for the ship *Anna*, dated November 1809, instead of the words "ship-damage," the following words are used, viz. :—"received after shipping the goods."

(q) The same question upon the construction of these clauses was submitted to the House of Lords upon a writ of

error, in the case of *Tod v. The East India Company*, the House, after consulting the Judges, decided, according to the unanimous opinion of the Judges, that the owner was not liable to make satisfaction to the Company for the damage done to goods in the ship by storm. May 20, 1788.

Thames, the Company shall not be liable for any freight or demurrage, nor subject to any demands of the owners or master, on account of the ship's earnings in freight, voyages for the company, or on account of any other employment, two questions have arisen. The first arose in the case of the ship *Winchelsea* (r), which had been let to the Company by a charter-party containing that clause, and whereby the Company had covenanted to load the ship home within *three* months after her arrival in *India*, with a *proviso*, however, authorising them to detain her in their service *a year* after the *three* months, at certain rates of demurrage therein specified. The Company detained the ship in their service in *India*, and towards the end of the year, after the *three* months, sent her to *Fort Saint David's*, where she arrived after the expiration of that year; and the master, upon his arrival, informed the president of that fort, that unless the Company would allow demurrage after the rate of the charter-party, he would protest against them for all damages, loss of time, and other accidents; whereupon the president and council agreed that the owners should be allowed demurrage for so long time, as the ship should be detained in the Company's service in *India*. She was so detained some time longer, and before she had received any lading homeward, was lost in a storm. The owners sued the Company upon the charter-party. After a trial and verdict, and while the case remained for the judgment of the Court of King's Bench, the cause was compromised by the Company's paying demurrage from the expiration of the year after the *three* months, until the time of the loss, with the costs. And Lord *Mansfield* then declared, "that the Court was very clear that the owners were entitled to no more," but declined giving any other opinion.

The second question arose in the case of the ship *Ganges*: and it arose upon the before-mentioned clause, and another of the clauses in those charter-parties, by which it is agreed that the Company shall pay to the owners in *England* 14*l.* for each passenger, *ordered on board* the ship by any of their agents, from any of their settlements. Several passengers were thus ordered on board the ship at *Bombay*, and were received accordingly. The ship was lost on the homeward voyage. The owners claimed to be paid for the passengers; the Company resisted the demand.

(r) *Hume v. East India Company*, 1 *Blac.* 291. But query, whether the form of action was properly adapted to the case.

The Court decided, that this clause did not apply to the case, and that the owners were entitled to the money (*s*). Great part of the expense of bringing home the passengers would necessarily be incurred in laying in provisions for them, before the ship's departure.

The charter-party of the last-mentioned ship gave occasion also to another question. It is stipulated by one of the usual clauses, that if the ship shall arrive at her consigned port in *India* or *China*, the Company's agents shall supply to the master, by way of impress, for buying necessary provisions for the ship, 200*l.* for every calendar month, and so in proportion for a less time, so long as she shall remain in *India* or *China*, to be computed from the time of the delivery of the Company's dispatches at her first consigned port in *India* or *China*, and to continue until the ship shall be discharged from her last port in *India* or *China*, to return to *Europe*. The *Ganges* was ordered from *England* to *Madras*, *Prince of Wales's Island*, and *China*, and performed her outward voyage, and took in her homeward cargo at *Canton*, with which she sailed for *England*, but meeting with bad weather on the voyage, was obliged to put into *Bombay* to refit. She remained at *Bombay* on this account several months, and was afterwards detained there two months longer by the governor and council of that settlement, and then dispatched for *Europe*. The Company had paid the monthly allowance for the period of the ship's stay in *India* and *China* until her departure from *Canton*, and also for the two months of her detention by the governor and council at *Bombay*. The owners claimed the allowance for the entire period of her stay at *Bombay*, contending that *Bombay* was her last port, within the meaning of this clause. But the Court held that *Canton* was such last port, and consequently that the owners were not entitled to maintain this claim.

According to the usual form of these charter-parties, a ship is now (*t*) let to the Company for the voyage therein-mentioned in trade, and also in warfare, and on any other service whatever, as the Company, or any of their Governors, &c. shall require or direct; and it is provided, that during the stay in *India* the Company's Presidents, &c. shall have liberty to employ the ship in trade, and also in warfare and otherwise howsoever, and shall have liberty to let the ship out to freight for the Company's sole benefit, and that the ship shall be furnished and armed with a

(*s*) *Moffat v. East India Company*, 10 East, 468. See the chapter on Freight, post. (1) 1826.

certain number of guns, &c. specified in the charter-party: and power is given to the Company, their Presidents, &c. to remove, restore and continue the master and officers of the ship; but if the master or other officer be displaced or removed, then the next in degree to the person removed, who shall be approved by the president, &c. shall succeed to the employment. Under the orders of the Company's presidencies in *India* the ship *Busbridge* was made to form a part of a military expedition, intended for an attack upon *Manilla*, in conjunction with some of his Majesty's ships; her upper works were considerably altered to enable her to carry a greater number of guns, her complement of seamen was much increased, soldiers were taken on board, a King's officer assumed the effective command, and hoisted the King's pendant, and the ship sailed from *Calcutta* to *Madras*, and from thence to *Prince of Wales's Island*; the expedition however was abandoned in consequence of a peace with *Spain*. The expense of the alteration of the ship was defrayed by the Company, and an allowance was made to the master for entertaining the King's officer, and his suite. The ship sustained some damage in the service, and repairs became necessary on her return to *Bengal*, which were made, and she returned to *England* with her cargo. The owners contended that this employment of the ship was not warranted by the charter-party, and that they were entitled to a separate and distinct payment in respect of it. The company insisted that the ship was during the whole time employed under the charter-party, and to be paid according to the provisions thereof: the Court was of the latter opinion, and decided accordingly (u).

16. I have said that the construction of charter-parties shall be conformable to the usage of trade.(v) Accordingly at the trial before Lord *Kenyon* of an action on a charter-party, by which it was stipulated that the merchant should have the exclusive use of the ship outwards, and the exclusive privilege of the cabin, the master not being allowed to take any passengers, at which trial the defendants insisted that under a charter-party so worded, it was the constant usage of trade, to allow the master to take out a few articles for private trade; his lordship suffered evidence to be given to prove this usage, observing, that although *prima facie*, the deed excluded this privilege, yet he thought the deed might be

(u) *Dobree and Others v. East India Company*, 13 East, 290.

(v) See ante, s. 11, p. 239, 240.

explained by uniform and constant usage, the usage being a tacit exception out of the deed (*w*).

By a charter-party, the merchant covenanted to furnish a full cargo at *Charles Town* or *New Orleans*, at his option, for which freight was to be paid if the goods were shipped at *New Orleans*, for cotton, in round bales, 3*d.* per pound, and in square bales 2*d.* per pound; and for rice, of which he was at liberty to load not more than one hundred and fifty tons, 8*l.* 8*s.* per ton. The ship did not obtain a cargo at *Charles Town*, and was ordered to *New Orleans*. It was the established and uniform practice of the latter place, though not of *Charles Town*, to re-compress, by means of steam-engines, all cotton intended for exportation, unless the ship was unable to get a full cargo; the merchant loaded the ship with cotton only, of which, if re-compressed, the ship would have contained one hundred and seventy tons above the cargo actually shipped. The quantity actually shipped was not a sufficient cargo, even of bales not re-compressed, and the merchant was held liable to pay the value of the freight of the additional one hundred and seventy tons, and without any allowance in respect of the lower rate of freight for rice. Rice, if laden, must have been put into the ship before cotton; and therefore the merchant was considered to have elected to furnish an entire cargo of cotton (*x*).

17. But although the words of a charter-party may receive a liberal construction, yet the construction must not be inconsistent with their plain and obvious meaning. And therefore in the case of a charter-party, by which a ship was to sail from *London* to join convoy, and proceed from thence to *Barcelona*, and there deliver her cargo; and *forty-one* running days were to be allowed to wait at *Portsmouth* for convoy, and to discharge the cargo at *Barcelona*, the said *forty-one* days to be accounted and commence at *Portsmouth twenty-four* hours after her arrival there, and at *Barcelona* the day the ship should be ready to deliver her cargo, and

(*w*) *Donaldson and Another v. Forster and Others*, Guildhall Sittings, Mich. Term, 29 Geo. 3. Upon the evidence his Lordship thought the usage was proved, and *eleven* of the jurymen wished to find a verdict accordingly, but the *twelfth* insisting that he could not conform to the general opinion, as this was a positive contract, a juror was withdrawn by consent, and no verdict pronounced in

the cause.

See the observations made by Lord Eldon, on the maxim of construing a mercantile instrument by usage, in the case of *Anderson v. Pitcher*, 2 Bos. & Pull. 164. And see 2 Ves. 331.

(*x*) *Benson v. Schneider*, 7 Taunt. 272; 1 Mo. 21, and see the cases cited in section 11 of this chapter, p. 239, 240.

for all the time beyond the *forty-one* days *thirteen* shillings *per ton* were to be allowed for demurrage; Lord *Kenyon* held that the demurrage was only payable for delay beyond the *forty-one* days in waiting for convoy at *Portsmouth*, and in discharging the cargo at *Barcelona*, and not for the delays which the ship had experienced in waiting for convoy at *Falmouth*, to which place she was ordered to proceed from *Portsmouth*, by the Admiral's secretary; and at *Gibraltar-Bay*, into which she sailed under the direction of one of the sloops appointed to convoy the fleet, the rest having been dispersed in a storm, and where she waited *twelve* days for convoy to proceed to *Barcelona* (y).

It is probable that if the events, which took place in the course of this voyage, had been foreseen by the parties, the number of days would not have been confined, to waiting for convoy at *Portsmouth* only, but would have been expressed to be for waiting for convoy generally; but to have put such a construction upon this instrument, would have been to substitute other words for those, which the parties to it, had thought proper to use. And the reader will observe, that in this case there was not (nor indeed could have been) any general usage of trade applicable to the stipulation in question.

18. When goods are put on board in pursuance of a charter-party, the master is to sign for them bills of lading to the effect mentioned in the third chapter of this part, the charter-party being the instrument and evidence of the contract, for the conveyance, and the bill of lading the evidence of the shipping of the particular merchandize, to be conveyed in pursuance of the contract. But the master cannot be required to express in the bills of lading, a less rate of freight, than is mentioned in the charter-party. And in a case in which the agent of a merchant tendered at *Jamaica* a cargo of sugar, but insisted that the master should sign bills of lading for it at the rate of 10*s.* per hundred only, the rate mentioned in the charter-party being 10*s.* 6*d.* per hundred, and the master refused to receive the cargo on those terms, the merchant was held answerable on his covenant to load the ship, as he would have been if no cargo had been tendered (z). § Where it was agreed by charter-party that the ship should be at the disposal and direction of the merchant; that the master should receive a cargo at *London*, and proceed therewith to any port or ports in

(y) *Marshall v. De la Torre*, 1 Esp. N. P. C. 367.

(z) *Hyde v. Willis*, 3 Camp. 202.

Spain and *Portugal*, or either, as he should be ordered by the merchant, and there deliver the cargo agreeably to the bills of lading that should have been signed for the same; the merchant having loaded the ship for *Lisbon*, and the master signed bills of lading for delivery there, it was held that the merchant could not change the destination, and send the ship to *Gibraltar*, without giving up the bills of lading to the master, or at least offering a sufficient indemnity against any claims, that might be made upon him by the holder thereof (a).

19. The performance of a contract under seal cannot, according to the law of *England*, be released by parol, or by a written instrument not under seal. The terms of such a charter-party may be explained by usage, but cannot be altered, nor can any terms be introduced so as to vary the nature of the original contract (b). And if by agreement of the parties, a new voyage be substituted for the voyage mentioned in the charter-party, and such voyage be performed, the owner cannot sue the merchant on the original instrument for the freight or demurrage (c), his remedy, if any, must be founded on the subsequent agreement. But if such a contract be to take effect from a particular time, an agreement relating to an earlier period of time, will not be a variation or dispensation, and may be good and binding. Thus, where by a charter-party under seal, a ship was let at a certain rate per month, to commence and be computed from the day of her departure from *Gravesend*, and was to take in her cargo at a port in the Channel, and sail therewith on the intended voyage, a subsequent verbal agreement for loading the ship in the *Thames*, and commencing the payment from the day of her clearing out at the Custom-house, was held to be binding, and the merchant was compelled to pay for the interval between clearing out and sailing from *Gravesend* (d).

Where, in an action of *assumpsit*, it appeared, that by agreement of charter, lay days were to be reckoned from the 16th of December, for loading the ship at *Cardiff*, and proof was given that *Pembroke* was afterwards agreed to be substituted for *Cardiff* as the port of loading; it was held, that the lay days must be reckoned from the 16th of December at *Pembroke*, as if the vessel had been at *Cardiff* (e).

(a) *Davidson v. Gwynne*, 14 East, 381.

(b) *Gibbon v. Young*, 2 B. Mo. 224.

(c) *Thompson v. Brown*, 7 Taunt. 656.

(d) *White v. Parkin*, 12 East, 578.

(e) *Jackson v. Galloway*, 5 Bing. R. 71.

CHAPTER II.

OF DEMURRAGE.

1. IN charter-parties, clauses are usually inserted, purporting that it is covenanted and agreed between the parties, that a specified number of days shall be allowed for loading and unloading, and that it shall be lawful for the freighter to detain the vessel for those purposes, a *further specified time*, on payment of a daily sum. These clauses constitute a contract on the part of the freighter, that he will not detain the ship for those purposes beyond the two designated periods; and if he does so detain her, he is liable to an action on the contract in the form adapted to the nature of the instrument.

When goods are shipped on board a general ship, words are also often introduced into the margin of the bill of lading, importing that they must be taken out of the ship within a certain time, or that in default, a certain sum per diem should be paid for every day afterwards.

§ The freighter, in the former case, and in the latter, the person who *claims and receives the goods under the bill of lading*, is liable to pay for every day beyond the term agreed upon, the sum specified in the charter-party or bill of lading. This delay, and the payment agreed upon, for it, are called *demurrage*, and although, if a ship be improperly detained by the freighter or consignee of goods, the owner may have a special action for the damage resulting to him from such detention; demurrage, properly so called, arises out of the terms of some contract thus expressly entered into between the shipowner and freighter, or thus stipulated in the bill of lading by the master or owners, and adopted^(a) and assumed by the consignee. Accordingly, it has been held, that the master of a ship who has undertaken, by a bill of lading, to deliver goods to the consignee "on payment of freight," cannot maintain an action against the

(a) *Harman v. Gandolphi*, Holt's N. P. 35, and *Harman v. Mant*, 4 Camp. 161.

consignee on an implied contract to pay demurrage (*b*); an inconvenience which may be easily obviated by the insertion of a few words in the margin of the bill of lading, notifying that it is a condition of the contract to carry and deliver the goods; that the consignee shall clear them in a certain number of days, after the ship's arrival, or pay so much per day for demurrage. § .

2. The word "days" used alone in a clause of demurrage for unloading in the river *Thames*, is said to be understood of working days only, and not to comprehend *Sundays* or holidays by the usage among merchants in *London* (*c*), but it is much better to mention working or running days expressly, according to the intention of the parties. § These days, in the absence of express stipulation on the subject, are to be reckoned from the time of the ship's arrival at the *usual place of discharge* in the port, and not *at the port*, although for the purposes of navigation some of her cargo may be discharged at the entrance (*d*).

It is competent, however, for the parties to the contract, to fix a particular place for the discharge of the cargo, other than the usual place of discharge at the destined port, or to provide, with a view to probable contingencies, that the vessel should discharge at one place or another, according to circumstances, or as may seem best in the discretion of the master. In the former case, the lay days will, of course, run from the ship's arrival at the place so fixed upon; in the latter, they will run from the ship's arrival at the place selected by the master, in the exercise of the discretion intrusted to him, although some part of the cargo may not be discharged there.

The plaintiffs, owners of the ship *Lusitania*, (*e*) and the master, agreed with the defendants to convey a cargo to *Oporto*, and if the master should think it possible to enter the port without risk from the batteries, to discharge the cargo there; but if not, the master bound himself to^o proceed off the castle of the *Fox*, or to some other point near the bar, where the vessel could lay in safety, and there discharge into boats, which the freighters bound themselves to send alongside the vessel; to be paid freight in full for the

(*b*) *Evans v. Foster*, 1 B. & Ad. 118; *Brouncker v. Scott*, 4 Taunt. 1; *Jesson v. Solly*, 4 Taunt. 52.

(*c*) *Cochran v. Retbergh*, 3 Esp. Rep. 121.

(*d*) *Brereton v. Chapman*, 7 Bing. 539.

(*e*) *Gibbons v. Buisson*, 1 Bing. N. C. 283. See also *Bailey v. De Arroyave*, 7 Ad. & Ell. 919, and *Jackson v. Galloway*, ante, p. 262.

voyage the sum of 475*l.*; or if the vessel could enter *Oporto*, discharge and reload there, then in lieu thereof, the sum of 300*l.* Twenty-five working days to be allowed the said merchants for unloading the cargo, lay days to commence when the ship was off the castle of the *Fox*, or other point where she was to be discharged, continue whilst there, cease if blown off the coast by stress of weather, and recommence when again at anchor at her station; 4*l.* per day demurrage for every day over and above the said lay days.

The ship sailed from *London* on the voyage mentioned in the charter-party, and arrived off the harbour of *Oporto* on the 3rd of *June*. The harbour of *Oporto* is about two or three miles up the river *Douro*. When the ship so arrived, the *Miguelites* were in possession of batteries on each side of the entrance of that river, and it was not possible for her to enter the port, without great risk and danger. She was accordingly brought up in the roads, off the castle of the *Fox*, just beyond the range of the *Miguelite* batteries. The ship remained at anchor in the roads, and delivered part of the cargo from time to time, as it was sent for by the consignee, until the 14th of *August*, when strong winds and squally weather obliged the captain to slip his cable, for the preservation of the ship. He brought her up again to the same anchorage on the next morning, and remained there until the 18th of *August*, when, having sustained some damage from the impact of another ship, he, to avoid further danger, stood out to sea, with about one-eighth of her cargo undischarged. The gale continuing, the *Lusitania* could not return to her former anchorage until the 25th of *August*. The *Miguelites* had then abandoned the batteries, and the river was open; but there was not sufficient wind and tide to enable the ship to cross the bar. The next day, the *Lusitania* went up the river, and came to anchor in the harbour of *Oporto*, where the residue of the cargo was delivered to the order of the consignee.

On these facts it was contended for the defendants, that the port of discharge was *Oporto*, and that the lay days must commence from the time of her arrival there. The plaintiffs claimed demurrage from the expiration of twenty-five days after the arrival of the ship off the castle of the *Fox*, where as they urged she was substantially discharged. "It is contended," said Chief Justice *Tindal*, "that the vessel was to discharge at *Oporto*, and that the lay days were not to commence till she was at the place

of discharge, but they are not so limited by the language of the charter-party, for they are to commence at the castle of the *Fox* or other point where the vessel is to be discharged: to cease if the vessel be blown off the coast, and commence again on her regaining her station." §

8. When a ship is detained beyond the time thus limited and ascertained, the daily rate of demurrage mentioned in the charter-party or bill of lading, will in general be the measure of the damages to be paid, but it is not the absolute or necessary measure; more or less may be payable as justice may require, regard being had to the expense and loss incurred by the owner, and the amount must be settled by a jury if the parties disagree (*f*). And when the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action for damages if the thing be not done within the time; *for he has engaged that it shall be done*. In the language of Lord *Ellenborough*, "the merchant is the adventurer who chalks out the voyage, and is to furnish, at all events, the subject matter out of which the freight is to accrue" (*g*). If the merchant is the author of the delay, by which expenses are occasioned, those expenses will fall upon him; (*h*) and if he covenant to do a particular act which it becomes impracticable for him to do, he must answer for his default, unless the act be, or become, contrary to the law of his country.

§ The case of *Randall v. Lynch* (*i*), is a leading case upon this point. It was an action on a charter-party for a voyage to *Lanceretto* and back to *London*, in which it was covenanted that the vessel, after taking in her lading, should proceed direct to the port of *London*, and upon arrival at the *London Docks*, and after regular report at the Custom-house, should discharge the said cargo, and there end and complete the voyage; that forty days should be allowed for unloading, loading, and again unloading the cargo; and that the freighter might further detain the vessel at his option for ten working days, upon paying 5*l.* per day demurrage. The breach alleged was, that the freighter had detained the vessel in the *London Docks* for thirty-five days beyond the ten days last mentioned. The defence was, in a narrative of the

(*f*) *Moorsom v. Bell*, 2 Camp. 616.

Adm. Rep. 382.

(*g*) *Barker v. Hodgson*, 3 M. & S. 267.

(*i*) 2 Campb. 356, and 12 East, 179.

(*h*) *The Angerona*, Marks, 1 Dods.

circumstances of the case. It appeared, that the ship arrived from *Lanceretto* in the *London Docks* on the 10th of *August* in the year the action was brought, and was reported next day at the Custom-house. The forty days stipulated in the charter-party for unloading the outward cargo, and loading and unloading the homeward cargo, expired on the 22nd of *August*, but on account of the crowded state of the docks, her discharge could not then be begun, and it was not finally completed till the 6th of *October*, being about thirty-one days after the expiration of the ten days during which time she might be kept on demurrage at 5*l.* per day. Under these circumstances, it was contended by the counsel for the defendant, that this delay was not in any degree to be imputed to him, but to circumstances over which he had no control; and, therefore, that he could not be liable where there was neither wilfulness nor negligence. But Lord *Ellenborough* held, that the detention of the ship, arising from the inability of the *London Dock Company* to discharge her, was, in point of law, imputable to the freighter; that the person who hires a vessel must be considered as detaining her, if at the end of the stipulated time, he does not restore her to the owner. "He is responsible for all the various vicissitudes which may prevent him from so doing. While the goods remained on board the vessel in the *London Docks*, it was impossible for the plaintiff to make any use of her; and to all intents and purposes, she was there detained by the defendant. When she was brought into the docks, all had been done which depended upon the plaintiff, and the Dock Company were the defendant's agents for her delivery. The defendant was as much responsible for a delay arising from the want of a berth, as if it had arisen from tempestuous weather, or any other cause."

In the case of *Leer v. Yates*,^(k) a general ship took brandies on board under bills of lading, which allowed twenty lay days for the delivery of the goods in *London*, and stipulated for 4*l.* per day demurrage afterwards. Certain of the consignees choosing to have their goods bonded, the vessel could not make her delivery at the *London Docks* until forty-six days after the twenty days; and some of the goods which were undermost could not, though demanded, be taken out, till the upper tiers were cleared. The

(k) 3 Taunt. 387; *Struck v. Tenant*, Trinity Term, 1806.
Coram Mansfield, C. J. Guildhall, after

Court of Common Pleas, notwithstanding, decided that each of these consignees was liable on a general count for demurrage to pay the 4*l.* per day for the forty-six days. Chief Justice *Mansfield* said, "I was struck with the argument that it was not the fault of the defendant, but the fault of the plaintiff himself that these goods could not be got out, until other goods which lay above them were delivered. But it is not, in truth, the fault either of the plaintiff or the defendant, that the goods could not be taken out. There can only be so many goods on the top of the vessel as the proper stowage of the goods will allow; therefore, all the others must be at the bottom, and as this is a general ship, and the goods do not all belong to the same consignee, the goods of some of the consignees must be undermost. If this argument would avail, therefore, that the captain was not entitled to demurrage for the goods which were not uppermost, it would restrain the contract for demurrage to the few persons whose goods were at top; but that construction would be contrary to the positive contract, for it is impossible to get out of the words of this bill of lading."

A general ship (*I*) took some silks on board to carry from *Rotterdam* to *London* on defendant's account, and upon the margin of the bill of lading, which he accepted, was written, "the consignee to clear the goods in fourteen running days after her arrival in port, or to pay 4*l.* per diem for demurrage." The defendant applied for and was ready to receive his goods within the running days, but being undermost in the vessel, the delivery thereof could not be made until some days afterwards. "The consignee," said Chief Justice *Gibbs*, "by taking to the goods, contracts with the owners of the vessel to perform the terms upon which they have undertaken to convey and deliver them. Those terms are expressed

(*I*) *Harman v. Gandolphi*, Holt, N. P. 35. But see the cases of *Rogers v. Hunter*, 2 C. & P. 601; *Dobson v. Droop*, 4 C. & P. 112. In the former, Lord Tenterden held, that if the merchant be prevented from discharging within the stipulated running days by reason of other goods being placed above his, he must, when that obstruction is removed, discharge with reasonable diligence—that he was not entitled at all events to the same number of days after the goods can

be got at as is specified in the contract, but to a reasonable time to be determined according to the circumstances. In the latter case Lord Tenterden directed the jury that the defendant (the consignee) was not liable for demurrage unless he suffered the goods to remain on board after the time stipulated for, when he might have got them sooner. And see a more full report of Lord Tenterden's observations in those cases at p. 275, 276.

in the bill of lading, and the defendants, by claiming and receiving the silks under the bill of lading, have acceded to those terms. Each consignee undertakes to clear away his goods in a certain time; and, although by the default of others he is prevented from so doing, he is liable to pay demurrage by the terms of the contract, unless the delay be occasioned by the fault of the captain or his crew."

In conformity with these decisions, it has been determined, that delay in loading a vessel beyond her running days, occasioned by frost (*m*), or by the prohibition of a foreign government to export the stipulated cargo (*n*), or by Custom-house regulations or restraints (*o*), or by the unlawful seizure of some part of the cargo by Custom-house officers (*p*), or by a prohibition of intercourse with the shore, on account of an infectious disease, are all misfortunes and casualties which fall upon the freighter (*q*). He might have protected himself by express stipulation—he might have limited his engagement to pay demurrage to cases of wilful or negligent detention,—for delays occasioned by the wrongful act of others, he has his remedy against them;—but unless they be caused by the ship-owner himself, the freighter or consignee must pay demurrage according to his contract.

It is no answer to this claim, for the consignee to allege, that he did not receive notice of the arrival of the ship, within the time stipulated by the bill of lading, for the discharge of the cargo, for it is his duty to inquire for and watch the ship's arrival, or that he did not receive the bill of lading in time, and the master insisted on its being produced, or on an indemnity (*r*), for the master had a right so to insist (*s*) for his own protection; but if the delay was occasioned by the neglect, or even the inability, from unavoidable accident, of the owner, to obtain the necessary clearances for sailing, (which it is his duty to obtain,) then he and not the freighter, is the cause of the delay, and must bear the loss resulting from it (*t*), unless indeed he omitted to apply for them at the request of the freighter or consignee (*u*).

4. For the eventual hardship or unprofitableness of the engage-

(*m*) *Barrett v. Dutton*, 4 Campb. 333.

(*n*) *Blight v. Page*, 3 B. & P. 295.

(*o*) *Hill v. Idle*, 4 Camp. 137.

(*p*) *Bessy v. Evans*, 4 Campb. 131.

(*q*) *Barker v. Hodgson*, 3 M. & S. 267.

(*r*) *Harman v. Clarke*, 4 Campb. 159;

Harman v. Mant, 4 Campb. 234.

(*s*) *Jesson v. Solly*, 4 Taunt. 52.

(*t*) *Barret v. Dutton*, 4 Camp. 333.

(*u*) *Furnell v. Thomas*, 6 Bing. 188.

ment into which the merchant or freighter has entered, he has himself alone, to blame; the law in all these cases does no more than enforce it. He might have bound himself by terms less stringent, and capable of a more liberal interpretation in his favour, or by avoiding all express stipulations on the subject, he might have allowed the law, in case of dispute, to determine, with reference to the course of the particular trade, or the usages of the particular port, what would, under all the circumstances of the case be reasonable and just.

Thus, where in a charter-party it was covenanted that the freighter, the defendant, should unload the ship *within the usual and accustomed time*, it appeared that the ship *Margaret* entered the *London Docks* with her homeward cargo, on the 25th of *August*, and was reported the following day; on the 31st of the same month, her cargo, consisting of wines, was bonded by the defendant, and he was ready to have received it, if it could have been unloaded, but on account of the crowded state of the *London Docks* at this time, the ship could not get a berth till the 20th of *October*, and was not fully discharged till the 26th of that month. If the duties had been immediately paid upon the wines, they might have been landed in a much shorter time; but the superintendent of the *London Docks* said, he had never, since the bonding system was introduced, known a cargo of wines brought by a ship so large as the *Margaret* landed and delivered; but that such cargoes had always been bonded. It was contended that the duties ought to have been immediately paid, that the freighter was liable for the detention of the ship, beyond the time when she might have been discharged, and the case of *Randall v. Lynch* was cited as an authority for that position. But Lord *Ellenborough* said, "In that case a specific period of forty days had been fixed by the charter-party for loading and unloading the cargo. The stipulation in the present case is, that the freighter shall be allowed *the usual and customary time* to unload the ship in her port of discharge. The question, therefore, is, what is the usual and customary time for a ship to unload a cargo of wines in the port of *London*? The answer seems to be, when the ship gets a berth by rotation, and the wines can be discharged into the bonded warehouses. The wines might have been bonded sooner by an immediate payment of the duties; but since the bonding system was introduced,

this has ceased to be *the usual and customary mode of unloading a cargo*" (v).

Thus, again, in the case of *Burmester v. Hodson* (w), the defendant was the consignee of a cargo of brandy from *Charente* to *London*, by the ship *Athalia*, of which the plaintiff was the master. The bill of lading contained no stipulation for demurrage or for unloading the brandy in any specified time. The ship entered the *London Docks* on the 19th of *August* 1809, but as the Docks were extremely crowded, and the brandy was to be bonded, she was not able to begin to unload until the 11th of *October*, and did not discharge the whole of her cargo until the 19th of the same month, making a period of sixty-three days from the time she entered. Evidence was given of an invariable practice to bond cargoes, and that when the Docks were not over crowded, twenty or twenty-three days were a sufficient space of time for unloading. The plaintiff insisted that he was entitled to a compensation in the nature of demurrage, from the time the ship might have been unloaded, till she was completely discharged.

But *Mansfield*, C. J., said, "This case cannot be distinguished from *Rogers v. Forrester*. Here, the law could only raise an implied promise to do what was *there* stipulated for by an express covenant, namely, to discharge the ship in the usual and customary time, for unloading such a cargo. That has been rightly held to be the time within which a vessel can be unloaded in her turn into the bonded warehouses. Such time has not been exceeded by the defendant. If the brandies were to be bonded, they could not be unloaded sooner, and the defendant seems to have been as anxious to receive, as the plaintiff was to deliver them." §

5. No demurrage can be claimed in case of the hostile detention of the ship, or what is equivalent to it, the hostile occupation of the intended port, or in case of accidents by winds and sea, even although after such delay it may be found expedient entirely to abandon the voyage, and thereby the whole employment of the ship becomes unprofitable (x).

The payment of *demurrage*, stipulated to be made while a ship is waiting for *convoy*, ceases as soon as the convoy is ready to depart; and such payment stipulated to be made while a ship is waiting to receive a *cargo*, ceases, when the ship is fully laden,

(v) *Rogers v. Forrester*, 2 Camp. 483.
(w) 2 Campb. 488.

(x) *Liddard v. Lopes*, 10 East, 526;
Holt on Shipping, 337.

and the necessary clearances are obtained, although the ship may in either case happen to be further detained by adverse winds or tempestuous weather. And if the ship has once set sail and departed, but is afterwards driven back into port, the claim of demurrage is not thereby revived. This appears by the two following authorities:—

First, as to *waiting for convoy*. Two ships, the *Swallow* galley and the *Beak* galley, were hired by charter-party, for a voyage from *Leghorn* to several ports in the *Mediterranean*, and from thence to *London*, and it was stipulated, that after receiving their cargo at the ports in the *Mediterranean*, they should sail directly for *Gibraltar*, and there remain until some convoy should then next present from thence, bound either for *Lisbon* or *England*, and sail with such convoy either for *Lisbon* or *London*, and if the convoy should not proceed directly for *England*, should remain at *Lisbon* until some convoy should present from thence for *England*, and then sail with such convoy; and if the convoy should not go into the *Downs*, then they should wait at the first port they should make in *England*, for convoy from thence to the *Downs*; and the merchants covenanted to pay in *London*, 6*l.* per day for the *Swallow*, and 7*l.* per day for the *Beak*, for each day that they should wait for convoy at *Gibraltar*, *Lisbon*, or elsewhere, during the voyage, above the space of *twenty* days in the whole, during which *twenty* days they were to lie at the charge of the commanders. The ships having received their lading, sailed for *Gibraltar*, and arrived there on the 11th of *March* 1708. On the 25th of *September*, Sir *John Leake* passed by *Gibraltar*, but refused to take them under his convoy, having appointed Captain *Moody* for that purpose. On the 27th of *September*, Captain *Moody* arrived at *Gibraltar*, and staid there till the 6th of *October*, on which day the ships, after having waited one hundred and forty-eight days, sailed with him for *Lisbon*, arrived there with him on the 16th of the same month, and staid with him there till the 14th of *November*, and then sailed with him for *England*, and arrived with him at *Falmouth* on the 2nd of *December*; and there the two ships waited till the 17th of *January*, when they sailed from thence and joined Captain *Moody* at *Plymouth*, he having previously left *Falmouth*, and put into *Plymouth*, and sailed with him to the *Downs*, and ultimately arrived in safety at *London*. Part of the delay of the two ships at *Falmouth*, and of Captain *Moody* at *Plymouth*, was occasioned by tempestuous weather.

The masters claimed demurrage for the whole period of the several detentions after the first *twenty* days. The merchants insisted that nothing was due for the time they waited *after Captain Moody joined them*; and indeed at first insisted, that they ought to have sailed with Sir *John Leake*, but this was held to have been impossible. The Lord Chancellor *Cowper* declared, that demurrage was payable both during the time that the ships waited for the arrival of convoy, and during the time that the convoy was not ready to sail; for if the convoy was not ready or able to sail at any time when the ships were both able and ready, the staying of the ships for the convoy was the same thing as if no convoy was near at hand; but that no demurrage ought to be allowed while the ships and their convoy staid for want of wind, or were detained by contrary winds; and upon this principle it was ultimately decided by the Lord Chancellor (r), and afterwards by the House of Lords upon appeal (s), that demurrage should not be paid for such portion of the detention at *Falmouth*, as was thought properly attributable to the weather, but that it should be paid for all the rest of the time that the ships had waited there, and for the whole period of their stay at *Lisbon* and *Gibraltar*, after the expiration of the first *twenty* days.

Secondly, as to *waiting for a cargo*. *Jamieson & Co.*, merchants at *Leith*, having contracted with *Atkins & Co.*, merchants at *St. Petersburg*, for a quantity of tallow, which, as the latter represented, would be ready for delivery in the beginning of *August*, sent the ship *Bell*, whereof *John Lawrie* was owner, and one *Anderson* master, to *Cronstadt*, under the following letter of instructions delivered to the master, which was the only evidence of the contract between the parties:—"You will on your arrival at *St. Petersburg*, deliver our inclosed letter to *Messrs. Atkins, E. Rigail & Co.*, to whom we address your ship the *Bell*. They will ship one hundred tons of tallow, and get you what deals and battens you may want to fill up your ship. You have a provisional order to *Messrs. G. Scougal & Co.* for forty tons of iron to *Messrs. S. & R. Anderson*; if they cannot ship it in time, you may apply to *Messrs. Hill, Cazalett & Co.*, to whom you

(r) *Lannoy and Another v. Werry and Another*, 2 Bro. P. C. 60.

(s) The only alteration of the Chancellor's decree made in the House of

Lords, was in the number of days, for which demurrage should be paid at *Falmouth*.

have a letter; failing them, you may make inquiry through the factory, and if you can't get any, you'll directly load without it. *Observe, you must get clear and sail before the 1st September, N. S.*, as the premiums of insurance advance greatly after that date. About this we wrote particularly to *Messrs. Atkins, E. Rigail & Co.*, and we hope they will attend to it. We have no objection to your taking any goods on freight to the extent of fifty or sixty tons, but the ship must not be detained for them; and with respect to deals, you will be at great pains in wracking them."

The ship arrived at the port of destination on the 22nd of *July* 1787, and the master applied to *Atkins & Co.* according to the instructions. They informed him that the tallow, which was to come by water from the interior of the country, could not be expected till towards the end of *August*; and, in fact, on account of the dryness of the season, which retarded the inland navigation, it did not arrive at *St. Petersburg* till *October*, and was not shipped till near the end of that month. The master made a protest against the merchants for not loading the ship by the 1st of *September*, but waited for the tallow by the directions of *Atkins & Co.*, and, as it seemed, under an opinion that he was bound to do so. The lading was completed, and the ship's clearances obtained on the 28th of *October*, and the ship, having waited a few days for a wind, sailed out of the mole of *Cronstadt*, but soon meeting with adverse winds and frost, was forced to return to *Cronstadt*, and was there frozen up, and remained until the 11th of *May*. The winter began earlier than usual. Upon the arrival of the ship and delivery of the cargo at *Leith*, the owner claimed of *Jamieson & Co.* freight at the usual rate for the voyage; demurrage from the 1st of *September* till the 11th of *May*, and an indemnification against a claim made upon him by another merchant for whom he had shipped some flax soon after the arrival of the vessel at *Cronstadt*, for damages occasioned by the delay in bringing the flax to *Leith*.

The case was litigated in several courts in *Scotland*, and was at last brought by appeal to the British House of Lords. It was admitted on both sides, that the master might by law have returned empty, or have obtained another cargo after the 1st of *September*, but the owner of the ship contended, that as the master had waited at the request of the correspondents of *Jamieson & Co.*, they were answerable for all the damage arising from that delay.

The House of Lords decided that *Jamieson & Co.* should pay

only the usual freight, and a compensation in the nature of demurrage for the period between the 1st of *September* and the 29th of *October* (t). This decision was conformable to one of the determinations which had taken place in *Scotland*, and also to the usage of trade, as represented by several merchants in *London*, who had been examined in the cause, and who deposed that the claim of demurrage ceased as soon as a ship is cleared out and ready for sailing.

By a charter-party, the owner covenanted that the ship should take a cargo at a port, and proceed with the first convoy that should sail for *England* fourteen working days after she was ready to load, and the merchant covenanted to load and dispatch her within fourteen days after notice that she was ready to load, with liberty, however, to detain her fifteen running days after the expiration of the fourteen, paying four guineas per day demurrage. The first convoy sailed after the fourteen days were expired, but before the termination of the additional fifteen days. No other convoy sailed until nearly two months after the first. Under these circumstances, the owner sued the merchant for the demurrage, and also for compensation for the detention of the vessel beyond the fifteen days; but it was held that the merchant was not liable for the latter, and that the parties were in the same condition at the end of the fifteen days, as they would otherwise have been in, at the end of the fourteen days (u).

§ 6. The decision in *Leer v. Yates*, and the cases which followed upon it, have been the subject of much doubt and controversy among merchants and lawyers. That the consignee of goods brought by a general ship, should be liable for the delay of those for whose diligence he has not stipulated—over whom he has no control—between whom and himself there is no connection, but that, which the contract of the shipowner with them has created, does certainly appear a case of peculiar hardship. Why should one man pay for the neglect of another? Because, it is answered, he has contracted to do so. But the question is, whether it be not a condition of the contract, into which he has entered to clear the goods within the time specified in the charter-party or bill of

(t) *Jamieson and Others v. Laurie*, p. 472, 2nd edit.

decided in the House of Lords 10th November, 1796. Reported 6 Bro. P. C.

(u) *Connor v. Smythe*, 5 Taunt. 654; 1 Mars. 276.

lading, that the master should be ready to deliver them, and whether that condition can be considered as performed, while the goods, without any fault of the merchant, continue inaccessible.

Lord *Tenterden*, in a recent case (*v*), adverting to these decisions, expressed himself as follows :—" I have great difficulty in saying, that when the consignee has had no opportunity of taking his goods within the time stipulated, he is bound by the contract to pay for not doing so ; *he cannot, I think in that case, be said to detain the vessel.* On the other hand, I do not agree to the proposition on the part of the defendant, that he has necessarily the stipulated time, to be computed from the period when the discharge of his own goods can be commenced ; I think after that period he must use reasonable dispatch. The true principle seems to be this : If the goods of the particular consignee are not ready for discharge at the time of the ship's arrival, he must have a reasonable time for removing them after they are so ; if in such a case using reasonable dispatch, he cannot clear them within the stipulated period from the ship's being ready to discharge her cargo generally, he will not be liable for demurrage till the expiration of such a reasonable time ; but when it is expired, he will be liable, though the stipulated period, if computed from the time when the discharge of his own goods could have commenced, is not at an end."

In a subsequent case, Lord *Tenterden* said, " I am certainly of opinion, that if a consignee cannot get his goods, because some other person's goods prevent him, he is not liable for the delay of the vessel " (*w*).

As, however, the decisions thus questioned, are still referred to in the works of writers of great experience (*x*) for the rule of mercantile practice, it has been thought advisable to submit them to the attention of the reader. §

(*v*) *Rogers v. Hunter*, 1 Mo. & M. 63.

(*w*) *Dobson v. Droop*, 1 Mo. & M. 441.

(*x*) See *Macculloch's Dictionary of Commerce*, tit. Demurrage. See also a

"Treatise on the Office and Practice of a Notary of England, and on the Law Merchant," by Richard Brooke, Solicitor and Notary. Saunders and Benning, (1839) p. 162.

CHAPTER III.

OF THE CONTRACT FOR CONVEYANCE OF MERCHANDIZE IN A
GENERAL SHIP.

1. THE contract for the conveyance of merchandize in a *general* ship, is that, by which the master and owners of a ship, destined on a particular voyage, engage separately with various merchants unconnected with each other, to convey their respective goods to the place of the ship's destination. It has been already shown (*a*) that this contract, although usually made personally with the master, and not with the owners, is considered in law to be made with them also, and that both he and they are separately bound to the performance of it.

When a ship is intended to be thus employed, it is usual in *London*, and other places, to give notice of the intention, by printed papers and cards, mentioning the name and destination of the ship; her burthen and sometimes her force; and sometimes expressing also that the ship is to sail with convoy, or with the first convoy for the voyage, or other matters relating thereto. At a trial at *nisi prius*, in the 40 Geo. 3, it was said by the jury, that among merchants this expression was understood to be an assurance or warranty to the merchant, who laded goods in pursuance of the advertisement, and to become a part of the contract with him, although not afterwards contained in the bill of lading (*b*).

This dictum, where convoy is not mentioned in the bill of lading, must be considered as very doubtful. In an action afterwards brought by a person who had shipped goods on board a general ship, for *Grenada*, against the owner, for having sailed without convoy, in consequence of which he had lost the benefit

(*a*) Ante, part 2, chap. 2.

(*b*) The case here referred to was probably the case of *Rinquist v. Ditchell*, 3 Esp. 64. It is stated in the report that the bills of lading contained a war-

ranty to sail with convoy, but that appears from the observations of Gibbs, Ch. J., in *Sanderson v. Busher*, after cited to be an error.

of an insurance which he had effected, the ship having been captured on the voyage; it appeared at the trial that the ship had been put up or advertised "to sail with convoy;" but that the bill of lading made no mention of convoy; that it was in fact intended that the ship should sail with convoy, but that she was blown out of the *Downs* in a gale of wind, and the master then intended to go into *Falmouth*, to wait for the convoy; but being prevented from doing so by the appearance of a *French* privateer, by which he was chased, he made sail for *Grenada*, and was afterwards taken.

At the trial the defendant obtained a verdict; the Court was afterwards moved to grant a new trial, and the case was argued at some length. A new trial was granted, in order that the Court might receive further information; and the attention of the counsel was directed to the following points: Whether the concise expression, "to sail with convoy," meant any thing more than that the ship *was intended* to sail with convoy; or could be construed as a *warranty* that the ship should sail with convoy, in the strict sense of the word *warranty*; what was the effect of the bill of lading, which made no mention of convoy; what was the effect of the endeavours used by the master to sail with convoy, and of the circumstances by which he had been prevented from doing so. The cause was not taken down to a second trial (c).

In a subsequent case, before Lord Chief Justice *Gibbs*, at *nisi prius*, where the bill of lading expressed that the ship was bound for *London* with convoy, that very learned judge held that the bill of lading amounted to an undertaking that the ship should sail with convoy (d). And in a similar case that occurred before Lord *Ellenborough*, at *nisi prius*, the point was not contested. The defendant, however, succeeded on the ground that his not sailing with the convoy arose from the fault of the shipper (e).

But if a general ship be advertised for a particular voyage, if that be altered, the owner is bound to give specific notice of the alteration to all persons who afterwards ship goods on board the vessel; and he is otherwise answerable for the loss which they sustain, by supposing that the destination of the vessel remains unaltered (f).

(c) *Snell v. Marryatt*, in K. B. 48 Geo. 3.

(d) *Saunderson v. Busher*, 4 Campb. 54, in note.

(e) *Magalhaens v. Busher*, 4 Campb. 54.

(f) Per *Gibbs*, Ch. J., in *Peel v. Price*, 4 Campb. 243.

2. When goods are sent on board the ship, the master or person on board acting for him, usually gives a receipt for them, and the master afterwards signs and delivers to the merchant, sometimes two, and sometimes three, parts of a bill of lading, of which the merchant commonly sends one or two to his agent, factor, or other person, to whom the goods are to be delivered at the place of destination, that is, one on board the ship with the goods, another by the post or other conveyance; and one he retains for his own security: The master should also take care to have another part for his own use. The master must make out his bill of lading, according to the direction of the shipper of the goods, or the holder of the receipt given on the shipment, for the shipper has a right to name the consignee to be mentioned in the bill of lading, even although it may not be expressed in the receipt that the goods are shipped for his account, this being tacitly understood; and if the master signs a bill of lading for delivery to another person, and delivers accordingly, he may be answerable to the shipper for the value of the goods (*g*).

OLD FORM OF A BILL OF LADING.

I. W. } SHIPPED, by the grace of God, in good order, by
No. 1. a 20. } A. B. merchant, in and upon the good ship called the
John and Jane, whereof *C. D.* is master, now riding
at anchor in the river of *Thames*, and bound for *Barcelona* in *Spain*, twenty bales, containing one hundred
pieces of broad cloth, marked and numbered as *per*
margin; and are to be delivered in the like good
order and condition at *Barcelona* aforesaid (*the dangers of the seas excepted*,) unto *E. F.* merchant there,
or to his assigns, he or they paying for the said goods
per piece freight, with primage and average
accustomed. IN WITNESS whereof, the master or
purser of the said ship hath affirmed to three bills of
lading of this tenor and date, one of which bills being
accomplished, the other two to stand void. And so
God send the good ship to her designed port in
safety.

DATED at *London*, the day of

(*g*) *Craven and Another v. Ryder*, 6 Taunt. 433, and 2 Marsh. 127.

The terms of this exception were altered some years ago, in consequence of an alarm taken by the shipowners, at the decision of a cause, that will be mentioned in a subsequent chapter (*h*); and of late the exception is usually made in the following words; ("*The act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever, excepted.*") But in the case of ships homeward bound from the *West India* islands, which send their boats to fetch the cargo from the shore, there is introduced a saving out of this exception "of risk of boats, so far as ships are liable thereto." And in that case the whole clause is as follows: "*The act of God, the King's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, save risk of boats, so far as ships are liable thereto, excepted;*" but these additional words are probably redundant; they do not make the owner liable for a loss in boats, to which he would not be liable in the ship, where boats are customarily used (*i*). Other clauses may be introduced, either to take away the responsibility of the master and owners in cases for which they would otherwise be responsible, or to give to them or to the shippers an advantage to which they would not otherwise be entitled. Instances of this kind, providing for a payment in the nature of demurrage, have been already noticed (*j*).

In the above-mentioned form of a bill of lading the name of a consignee is mentioned, but sometimes the shipper or consignor is himself named as consignee, and the engagement is expressly to deliver to him or his assigns; and sometimes no person is named as consignee, but the terms of the instrument are, "*To be delivered, &c. unto* *order, or* *assigns,*" which words are generally understood to import an engagement on the part of the master to deliver the goods to the person, to whom the shipper or consignor shall order the delivery, or to the assignee of such person. This subject will be further considered in a subsequent chapter (*k*).

(*h*) *Smith v. Shepherd*, post, chap. 5 of this part, sect. 1.

(*i*) See the case of *Johnson v. Benson*, 4 B. Moore, 90, and chap. 5 of this part.

(*j*) See *Harman v. Clarke and Others*; *Same v. Mant and Others*, 4 Campb. p. 159 and 161; *Leer v. Yates*, 3 Taunt.

387; and see before p. 270; *Jesson v. Solly*, 4 Taunt. 52; *Brouncker v. Scott*, 4 Taunt. 1; *Evans v. Foster*, 1 B. & Ad. 118.

(*k*) Chap. 10 of this part. Of Stoppage in Transitu.

§ 3. The bill of lading is the written acknowledgment of the master that he has received the goods from the shipper, to be conveyed on the terms therein expressed to their destination, and there delivered to the parties therein designated. The master, therefore, should be careful not to sign bills of lading until the goods are actually delivered to him, nor to permit the insertion of statements in the bill of lading at variance with the fact. By so doing he may bind his owners, and become himself responsible to them, and to other parties.

In the case of *Howard and others v. Tucker (1)*, goods were shipped in *India* for *London*, on account of *Wylie*. The bill of lading was forwarded to him, and he indorsed it over for value. The goods were stated in the bill of lading, which was signed by the master, to be "shipped on board the *Bussorah Merchant*, in the river *Hooghly*, for *London*, by *R. Charlton*, on *Wylie's* account and risk, unto shipper's order, or to his assigns, he or they paying freight for the said goods, *being paid in Bengal*, with *primage and average accustomed*." The freight had, in fact, not been paid in *Bengal*. The captain had signed the bill of lading in that country, at the desire of *Charlton*, the shipper, and on the understanding that he meant to pay the freight before the ship sailed, but which he had not done. The Court held, that the owners having given a bill of lading, by which freight appeared to have been paid before the ship's departure from *India*, were estopped, as against the assignee of such bill, from claiming freight when the vessel arrived; and Lord *Tenterden* said, "The captain might be answerable to his principals for having signed an instrument which contained an incorrect statement; yet that third persons who took the bill of lading, on the faith of such statement, for a value to which they might otherwise have thought it inadequate, ought not to suffer for it."

But between the shipper and the shipowner the bill of lading is not conclusive. Thus, in an action against the owners of the ship *Thames*, on a bill of lading signed by the master at *Sinapore*, for eight hundred and ninety bags of pepper, the declaration alleged that eight hundred and ninety bags were shipped, and that some of them had been lost. The defence was, that only seven hundred and ninety bags were in fact shipped, and that the captain had been induced to sign the bill of lading for eight hun-

(1) 1 B. & Ad. 712.

dred and ninety, by the fraud of the plaintiff's agent at *Singapore*. It was contended for the plaintiffs, that the bill of lading was conclusive, and estopped the defendant, who was owner of the ship. But Chief Justice *Tindal* said, he was of opinion, that as between the original parties, the bill of lading was merely a receipt, liable to be opened by the evidence of the real facts, and left the question to the jury, whether, in fact, eight hundred and ninety bags, or only seven hundred and ninety were shipped (*m*).

Again, the plaintiff in *assumpsit* declared, that the defendants, *Watling* and *Nave*, were owners of a ship called the *Search*, and that, in consideration that the plaintiff, at their request, shipped goods on board, to be delivered to him or his assigns, the defendants promised to deliver them, and had failed to do so. *Nave* pleaded separately, that the plaintiff did not cause the goods to be shipped in and upon the said vessel. On the trial, the plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to the plaintiff by *Watling*, which stated the goods to be shipped by *Watling*, to be delivered to the plaintiff, or his assigns. It was also proved that the plaintiff held the bill of lading for value. Evidence was offered at the trial, on the part of the defendant, *Nave*, to show that, although the master signed the bill of lading for the goods, yet they were never shipped on board the vessel, as therein expressed; and the question for the consideration of the Court was, whether the defendant, *Nave*, was estopped by the bill of lading from showing that fact. "The statement in the declaration," said Mr. Justice *Littledale*, "is, that the plaintiff caused the goods to be shipped, which is put in issue by the second plea. How does the plaintiff prove his allegation? He puts in a bill of lading, which certainly appears to be signed by the master; but on the face of it, the goods are shipped by *Watling*. Then the plaintiff must prove *Watling* to be his agent; by so doing he supports the allegation. It turns out that, in fact, the goods were not shipped on board the *Search* at all. But the plaintiff says that the defendant, *Nave*, is estopped from showing this by the bill of lading, signed by his own agent. How is he estopped? *Watling* knew the fact, and his knowledge is the plaintiff's knowledge. The plaintiff knowing the fact by *Watling*, his agent, how is the defendant, *Nave*,

(*m*) *Bates v. Todd*, 1 Moo. & Rob. 106.

estopped by what *Watling* does as his agent? Since, therefore, the plaintiff, as shipper, is cognizant of the facts, we need not say how far, on the general question, there is an estoppel; but, in my opinion, the bill of lading is not conclusive" (m).

The decision in this case does not extend the principle on which the previous case of *Bates v. Todd* had been determined. It was conceded, however, in the argument for the defendant, and, though questioned, not denied by the Court, that if the statement in the bill of lading had altered the situation of parties (n),—if, for instance, as in the case of *Howard v. Tucker*, it had induced a third person to become an indorsee for value of it, the shipowner could not, against such indorsee, have disputed, what the master by his signature had affirmed. The right, therefore, of the holder of a bill of lading incautiously signed by the master for goods not actually shipped, is still open to discussion. Such a bill of lading ought not to exist; and Mr. Justice *Buller*, in the case of *Lickbarrow v. Mason*, suggested that the holder of it might have an action against the master who had signed it for a fraud. The argument in *Berkley v. Watling* is instructive to show, the nature of a bill of lading,—the extent to which it is negotiable, and binding on the master and owners, and the caution with which it should be signed.

4. There is often some difficulty in deciding, to whom the master and owners are responsible on their contract evidenced by the bill of lading, and whether actions for loss or injury, occasioned by their negligence or misconduct, should be brought by the consignor or consignee. No rule of general application can be laid down for the solution of this difficulty, but it will always be important to consider, in whom the right of property, and sometimes in whom the right of possession, was vested, at the time of the breach of contract, or neglect of duty which is complained of.

Where goods are sent by a vendor to a vendee, the delivery of them to the carrier usually vests the property in the latter, and he is the person to sue the carrier for the loss of them (o).

(m) *Berkley v. Watling*, 7 Ad. & El. 29.

(n) See the judgment in the case of *Pickard v. Sears*, 6 A. & E. 474.

(o) *Dawes v. Peck*, 8 T. R. 330; *Dutton v. Solomonson*, 3 B. & P. 584; *Brown v. Hodgson*, 2 Campb. 36. But by the terms of dealing between the

consignor and consignee, the latter is not to acquire a property in the goods, and they are to remain at the risk of the consignor until actual delivery, or if the consignee procured the goods to be consigned to him by fraud, so that no property in them passed to him, the consignor

If, in addition to being the purchaser of the goods, he have actually paid for them, or performed the conditions on which they are consigned, the shipment gives him also a right of possession, subject only to the stipulations contained in the bill of lading, which is at once the evidence of the master's having received the goods of the shipper, of the vendee's title to claim them from the master, and of the terms on which he, for the shipowner, has contracted to carry and deliver them.

But goods may be shipped to the order, and "on account and risk" of the consignee as purchaser, and yet his right to the possession of them be incomplete.

It frequently happens, that goods are not paid for before, or at the time of shipment, but by bill of exchange drawn for their amount on the consignee, or on other parties. Between the consignor and consignee, the agreement or understanding may be, that the property in the goods shall not vest in the latter, until such bills are accepted. When this is the case, the master will generally be required to sign bills of lading, to deliver the goods to the orders of the shipper, by whom, one part *undorsed*, will be forwarded to the consignee, to notify the shipment, and another part *indorsed*, to the agent of the consignor, to be delivered to the consignee when the condition of the consignment has been performed, by the acceptance of the bills of exchange.

In a recent case, a vessel was chartered by one *Berkely*, for corn purchased in and to be shipped from *Russia*. The bills of

may sue. *Stephenson v. Hart*, 4 Bing. 476; *Duff v. Budd*, 3 B. & B. 177. So if the goods were sent merely for approval, *Swain v. Shepherd*, Moo. & Rob. 224, or the carrier has contracted to be liable to the consignor in consideration of the carriage, *Moore v. Wilson*, 1 T. R. 659. In the recent case of *Fragano v. Long*, 4 B. & C. 219, the plaintiff, resident at Naples, ordered goods at Birmingham, to be dispatched; on insurance being effected, terms to be three months' credit from the time of arrival. An insurance was effected on them, in which the interest was stated to be in the plaintiff; the goods were sent to the shipping agent of the manufacturer at Liverpool, and by him delivered on the quay to the mate of a vessel bound to Naples. Before they

were actually put on board, they, by some accident, fell into the water and were lost. In an action of assumpsit against the owner of the vessel for negligence in shipping the goods, it was contended, that no bill of lading making the goods deliverable to the plaintiff having been signed, and the period of credit being three months after their arrival at Naples, no property had vested in the plaintiff. It was held, however, that the property had vested in him, when the goods were dispatched from Birmingham; that although the goods should not arrive at Naples, he would still be bound to pay for them in a reasonable time, and that he might, therefore, maintain an action for injury done to them by the negligence of the shipowner.

lading were made for delivery to the *shipper's own order*; an *unindorsed* part was transmitted to *Berkely*, and an *indorsed* part to an agent of the shippers in *London*, who was to hand it over to *Berkely*, on his giving security by bills for the price. *Berkely* refused to give the required security, whereupon the agent of the shippers claimed the goods on their arrival; but the master delivered them to *Berkely*, on his assurance that he was entitled, as purchaser, and that the goods were shipped on his account and to his order. An action was brought by the shippers against the *owners* of the vessel, founded on the bill of lading, for not delivering pursuant thereto; and it was admitted on the trial and argument, that even if *Berkely* had established his right, there must have been a verdict against the defendants, with *nominal damages* for the breach of their contract (*p*). "The complaint," said Lord *Tenterden*, "against the defendants is, that instead of delivering the goods to the plaintiffs' orders, they delivered them at another place, and to a person who had not the plaintiffs' orders. This was a breach of the contract, for which the plaintiffs might undoubtedly maintain an action against the shipowners. But they defend themselves under *Berkely*, and say that he had a right to receive the goods; for the property had vested in him, and therefore, the plaintiffs are not entitled to more than nominal damages. Let us see how that is. The wheat had been purchased on his order, which he revoked. By the original terms of the contract it was to be sent to *London*, and bills were to be drawn upon *Harris & Co.* for the amount. *Berkely* directed them not to accept the bills drawn on them, and they were not accepted. He could have no right to the goods unless he allowed *Harris & Co.* to accept the bills, for that was part of the bargain. It is impossible, therefore, to say that the property vested in *Berkely*, and the defendants were not justified in delivering the wheat to him." Mr. Justice *J. Parke* added, "The question in this case is, whether the property in the goods shipped, ever vested in *Berkely* at all? That depends entirely on the intention of the consignors. It is said that the plaintiffs, by the very act of shipping the wheat, in pursuance of *Berkely's* order, irrevocably appropriated the property in it, to him. I think that is not the effect of their conduct, for, looking to the letter of the 26th of *August*, it manifestly appears, that they intended that the property should not vest in *Berkely*, unless the bills were accepted. They stated

in that letter that they had drawn upon *Harris & Sons* and *Berkely*, bills, amounting to 810*l.*, and they recommended them to his, *Berkely's* protection. They also stated that they had forwarded to *Harris & Son* an *indorsed* bill of lading, and they inclosed to *Berkely* an *unindorsed* bill of lading. The fact of their transmitting the latter bill of lading to *Berkely*, and an *indorsed* one to *Harris & Sons*, shows clearly that they did not intend that the property in the wheat should vest absolutely in *Berkely*, but should be subject to a condition that the bills were accepted. As they were not accepted, *Berkely* had not performed the condition on which the vesting of the property in him was to depend, and therefore it never did vest in him."

5. It thus appears, that the shipment of goods, does not always vest the property of them in the consignee, though he be a purchaser. Bills of lading for delivery to the order of the shipper, or to ———, or order, or assigns, convey notice to the master, that although the goods be shipped on account and risk of a consignee, and delivery to him be the ultimate object and intention of the shipment, there may yet be some condition unperformed, on which his right to possession depends. It is his duty, in such cases, to retain, and he cannot safely deliver the goods, until they are claimed of him by the holder of a bill of lading, *indorsed* by the shipper, to whose order he has engaged to deliver them (*p*).

A case, the peculiar circumstances of which, make it an exception to this rule, may assist in its illustration.

It was an action of trover, (*q*) against a warehouseman who had refused to restore goods delivered to him by the plaintiff for safe keeping, on the ground that they belonged to *Smidt & Co.*, by whom they were shipped. These persons being resident at *Riga*, and *indebted to the plaintiff*, had accepted from him an order to purchase goods, for which the plaintiff sent his own ship. *Smidt & Co.* delivered the goods so ordered to the captain, telling him at the same time, that they belonged to the plaintiff. After the captain had received them, he was requested by *Smidt & Co.* to sign a bill of lading, deliverable to ——— or his order, for which he was to receive freight at the rates therein specified. The captain objected to sign the bill of lading with a blank for the name of the consignee, but being assured it was of no consequence, as the goods were to be delivered to his owner, was induced to do so. To the plaintiff, *Smidt & Co.* wrote, advising him that they had shipped the

(*p*) See post, p. 472. (*q*) *Ogle v. Atkinson*, 1 *Mars. Rep.* 323; and 5 *Taunt.* 759.

goods for his account and risk, and inclosing invoices, in which he was charged a commission on their amount. This letter they sent to *Lehr*, their own agent in this country, informing him that they had remitted bills drawn on the plaintiff to *Messrs. Ruckers*, and that they should make the bills of lading to order, that in case of his not accepting the drafts, *Messrs. Ruckers* might receive the goods. *Lehr*, in pursuance of these instructions, called upon the plaintiff before the ship arrived, delivered to him the letter inclosing the invoices, stated that *Smidt & Co.* had drawn upon him bills for 1500*l.*, which were in the hands of *Messrs. Ruckers*, and requested the plaintiff to accept them. The plaintiff refused, and *Lehr*, in consequence, indorsed the bill of lading to *Messrs. Ruckers*. On the ship's arrival in *England*, *Messrs. Ruckers* claimed the goods as indorsees of the bill of lading, but the Captain refused to deliver them, and delivered the goods to the plaintiff, who deposited them with the defendants as warehouse-keepers, on his account. The question was, in whom the property was vested, and this involved the further question, whether the master, under the circumstances, was justified in making delivery to his employer, the shipowner and consignee, contrary to the tenor of the bill of lading. "It is true," said Chief Justice *Gibbs*, "that the goods might have been delivered aboard the ship on the terms on which the defendant contends they were delivered, and if they had been, no doubt *Ogle* (the plaintiff) could not have obtained the goods without accepting the bills, but were they so delivered? *Smidt & Co.*, in their letter to *Ogle* never make mention of any bills to be accepted by *Ogle*. The case states that the Captain received them as the plaintiff's own goods, which means his own goods absolutely, without any qualification. If *Smidt & Co.* had said, 'we deliver the goods to you to be the goods of *Ogle*, if he accepts certain bills,' the defence would avail, but no such thing passes. The goods go on board, bills of lading are tendered to the captain to sign in blank, the captain objects. According to the defendant's argument, the answer should have been, 'I leave the bills in blank, because it is as yet uncertain to whom the bills may be deliverable, for the cargo is to go to *Ruckers* unless the plaintiff accepts certain bills;' but the answer given is, 'the blank in the bill is immaterial, for the goods are, at all events, to be delivered to your owner. If the blank was immaterial, it imported no alteration in the terms of delivery; if it was material, a fraud was practised on the captain which cannot avail the consignors.'

6. In determining by whom an action can be maintained against the shipowner for the loss or injury of the goods, cases of conditional consignment (the condition being unperformed) must be carefully distinguished from those in which by the terms of dealing between the consignor and consignee, the property in the goods vested in the latter at the time of shipment, (defeasible only by the former's right of stopping them in transitu); and also from those cases, in which the conditions attached to the delivery of the goods have been performed by the consignee.

In the case of *Cox v. Harden*, (r) the consignor abroad, upon receipt of orders from his correspondent in England, shipped goods on account and at the risk of the consignee, and took bills of lading from the master to the consignor's order, transmitting one of such bills *unindorsed*, with the invoice to the consignee, inclosed in a letter, informing him, that he had drawn upon him for the amount. By way of precaution, he sent another bill of lading *indorsed* to his own agent, *but of this he did not inform the consignee*. The master having *improperly* delivered the goods to the consignee on production of the unindorsed bill of lading, it was held that the property, which was defeasible before delivery in case of the consignee's insolvency, had vested in him by the delivery, and that the holder of the indorsed bill of lading could not maintain trover against him. This case is materially distinguished from that of *Brandt v. Bowlby* (s), by the absence of all intimation to the consignee that a bill of lading *indorsed* had been sent to the agent of the consignor, an intimation, which evinced a clear intention on his part, that the property should not vest absolutely in the consignee.

¶ In another case, goods were shipped to order, on account and risk of the consignee. An invoice of them and bills of lading to order or assigns, indorsed in blank, were also transmitted to the consignee, in a letter of advice, informing him that the consignor had drawn bills on him at three months, for the value of the cargo. Another bill of lading was afterwards sent to the agent of the consignor, under which he obtained the goods from the master, and insisted on immediate payment by the consignee, as a condition of delivery to him. The consignee offered his acceptance at three months, and on that being refused, brought an action of trover against the agent for

(r) 4 East R. 211.

(s) Ante, 285.

the goods. It was held, that by the delivery of the goods to the master, and the transmission of the bill of lading and invoice to the plaintiff, the property had passed to him, and that he was entitled to recover (*q*).

7. When bills of lading to shipper's order, or to —, or order, indorsed, or by which goods are made deliverable to a consignee by name, are transmitted to him as security for antecedent advances, or to indemnify him against liabilities in respect of the particular consignment which they represent, they are evidence of such a destination and appropriation to him of the specific goods, as will vest in him a property, absolute or special in them, at the time of their delivery on board, and so render the master responsible to him, for their loss or injury. Thus, where bills of lading, to shipper's order, indorsed in blank, were forwarded to the consignees to secure advances agreed to be made by them to the consignors, and the latter becoming bankrupts, their assignees claimed and obtained the goods from the captain, it was held, that he was liable in trover to the consignees (*r*). So, where goods were shipped, and bills of lading signed and transmitted to a factor, making them deliverable to him; upon proof by correspondence, of the intention of the principal to vest the property in the factor, as security for antecedent advances, it was held, that the latter had a special property in the goods the instant they were delivered on board, and that he might sue the master of the ship for their non-delivery (*s*).

Where a consignee at *Liverpool* on receipt of a boat receipt, or bill of lading, by which goods *actually laden* at *Longford* were made deliverable to certain persons at *Dublin* "in care for, and to be shipped to," him, accepted on the faith of the consignment a bill of exchange, it was held, that the boat receipt was evidence of an intention on the part of the consignor at the time of the lading to vest in the consignee, the property in the specific chattels laden, and that he might maintain an action of trover for them, against a person to whom they had been delivered, under a subsequent order of the consignor (*t*). The case, in respect of the goods thus actually laden at the time the boat receipt was signed, was distinguished from those, in which,

(*q*) *Walley v. Montgomerie*, 3 East, 585.

(*r*) *Haille v. Smith*, 1 Bos. & Pull. 513.

(*s*) *Anderson v. Clarke*, 2 Bing. 220.
And see the observations of Parke, B. on

that case in *Bryans v. Nix*, 4 M. & W. 792. See also the remarks of Lord Ellenborough in *Patten v. Thompson*, 5 M. & S. 356.

(*t*) *Bryans v. Nix*, 4 M. & W. 775.

there being no documentary or other evidence to prove an intention on the part of the consignors to vest the property in the consignee at the time of delivery to the carrier (*u*), it had been held not to have passed to him. But goods which were proved not to have been actually laden, or specifically appropriated to the consignee when the boat receipt was signed, were held, in the same case, not to have vested in him.

8. If the person to whom the delivery is ordered, is only an agent of the shipper, and has no property in the goods, it has been thought that he cannot maintain an action in his own name against the master for not delivering them—not in *assumpsit*, for the contract in the bill of lading was not made with him, but with a third person, the consignor of the goods—not in *trover*, because no property having passed to him, he can have no right to complain of their non-delivery or conversion as an injury to himself (*v*). But, whatever may be the contract between the consignor and the consignee, the agreement for the carriage is between the carrier and the consignor, and accordingly, it was held no variance to describe in a declaration the freight as payable by the consignor, though in fact, payable by the consignee (*x*).

In the case of *Evans v. Martlett* (*y*), this distinction is taken. If goods by bill of lading are consigned to *A.*, *A.* is the owner, and must bring the action against the master of the ship, if they are lost, but if the bill be special to deliver to *A.* for the use of *B.*, *B.* ought to bring the action.

The case of *Sargent v. Morris* (*z*) was decided on this principle. The declaration stated that the defendant was the owner of a vessel lying in the *Guadalquiver*, bound to *London*, and that the plaintiff shipped certain goods on board the said vessel to be safely conveyed by the defendant, and that in breach of his engagement, the defendant conducted himself so negligently in relation to the said goods, that they were damaged—plea, *non-assumpsit*. It appeared on the trial that the goods were shipped by *Bayo & Son*, of *Serille*, and that *they were the parties interested in the goods*. By the bill of lading, the captain acknowledged to have received on board the said vessel of *Don Pedro Bayo & Son*, the goods therein mentioned, and it then proceeded in the

(*u*) *Kinloch v. Craig*, 14 East, 582; *Nichols v. Clint*, 3 Price, 547; *Bruce v. Wait*, 3 M. & W. 15.

(*v*) *Waring v. Cox*, 1 Campb. 369; *Cox v. Harden*, 4 East, 211.

(*x*) *Moore v. Wilson*, 1 Term Rep.

659, cited by Mr. J. Patteson in the argument of *Berkely v. Watling*, ante, p. 283; *Davis and Jordan v. James*, 5 Burr. Rep. 680.

(*y*) 1 Lord Raym. 271.

(*z*) 3 B. & Ald. 273.

following words "*I undertake to deliver the same to you, and in your name, according to custom and usage, to Mr. Sargent, or his assigns, paying freight.*" The plaintiff, on receiving advice of the shipment, effected an insurance *on account of Bayo*, and advanced the premiums. It was objected that the action ought to have been brought by *Bayo and Son*, and not by the present plaintiff. Lord *Tenterden* said, "This is an action on a special contract, founded on a bill of lading, on the face of which it does not distinctly appear, whether the contract made by *Bayo and Son* was made *on their own behalf*, or as the agents of *Sargent*, who is named in the bill of lading as the person to whom the delivery is to be made. That fact is, however, afterwards ascertained by other circumstances, and it appears that the shipment was made *on account of Bayo and Son*, at *their risk*, and *for their benefit*, and not on the risk or for the benefit of the present plaintiff. It is true, if the goods had been delivered to him, that he would have had a lien to the extent of any advances he had made for freight or insurance, on account of his principal, and if there had been any deviation so as to discharge the underwriters, and the goods had never arrived, he would have been entitled to recover against *Bayo* for such advances. A *transfer of the property* is, however, very different from a *transfer of the contract*. It appears to me that this action, at the suit of the present plaintiff, is not maintainable." Mr. Justice *Bayley*, added, "The declaration describes the plaintiff as the original shipper, and the original contract as having been made with him. Now, I take the rule to be this; if an agent acts for me and on my behalf, but in his own name, then inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name, to say that he is merely an agent, unless you can also show, that he is prohibited from carrying on that action by the person on whose behalf the contract was made. In such cases you may bring your action, either in the name of the party, by whom the contract was made, or of the party for whom the contract was made. In this case the contract appears by the terms of the bill of lading to have been made with the *Spanish* house. Then for whom was it made? Why, upon the evidence in the cause, on account of the *Spanish* house."

This judgment of Mr. Justice *Bayley* is in conformity with that of Lord *Ellenborough*, in an action against the owner of a ship, on a bill of lading, which stated the goods to have been

shipped by the plaintiffs, but who in fact were only the agents of the owners-resident abroad. "I am of opinion," said his Lordship, that this action well lies. There is a privity of contract established between these parties by means of the bill of lading. That states that the goods were shipped by the plaintiffs, and that the freight for them was paid by the plaintiffs in *London*. To the plaintiffs, therefore, from whom the consideration moves, and to whom the promise is made, the defendant is liable for the non-delivery of the goods; after such a bill of lading has been signed by his agent; he cannot say to the shippers they have no interest in the goods, and are not damnified by his breach of contract. The plaintiffs are entitled to recover the value of the goods, and they will hold the sum recovered as trustees for the real owners" (a).

The result of these cases, which are not in all respects easily reconcilable, would appear to be, that actions against shipowners, as carriers, on their implied contract, and actions for the loss or injury of the goods entrusted to them, must be brought by a person who has some property in the goods. The consignee will be deemed to have such a property, unless the contrary appear (b). To enable a person to maintain an action of trover for goods, or for not delivering goods to him, he must also have a right of possession. In the case of an express contract, evidenced by a bill of lading, the action may be brought by the shipper with whom the master contracted, or by the owner of the goods, whose agent the shipper was, or in some cases by the person to whom, by the terms of the bill of lading, the master undertook to deliver them (c).

In considering to whom he will be safe, in making and in refusing delivery, it may be useful to remind the master, that he can rarely incur any responsibility, by adhering strictly to his engagement with the shipper. The case of *Ogle v. Atkinson* was a case of fraud; in those of *Brandt v. Bowlby* and *Harden v. Cox*, whatever might have been the rights of the consignees, the master and his owners had been safe, had he not departed from his contract in the bill of lading, to deliver only to the order of the shipper. In the cases of *Haille v. Smith* and *Anderson v. Clark*, the right of the consignees to the goods, resulted from the special circumstances under which they were consigned; but their right of action against the

(a) *Joseph v. Knox*, 3 Campb. Rep. 321.

(c) *Ante*, p. 290.

(b) *Coleman v. Lambert*, 5 M. & W.

master, was founded on the neglect of his engagement to deliver to the orders of the shipper. The master should remember, that the cases in which the consignor is entitled to alter the destination of a consignment are exceptions from the general rule. When once he has transmitted a bill of lading to a consignee by name, or in blank, or to his own order, indorsed, he may, if the goods were shipped on credit, and the consignee have become insolvent, assert his right of stopping them in their transit; but even that right will avail him nothing, against the title of an indorsee for value (c). The insolvency of the consignee may generally be easily ascertained; but whether he has paid for the goods, or whether the holder of a bill of lading be an indorsee for value or not, the master can seldom have the means of discovering. In case of conflicting claims it may be prudent to require indemnity, but if he make delivery to the person, who first claims the goods under a bill of lading regularly assigned to him, the consignor will seldom have much colour to complain of too strict observance of an engagement, which was drawn up by himself. §

(c) See post, Stoppage in Transitu. The law in America recognizes the same principles as the English law on the subject of the transfer of property by indorsement of the bill of lading. A consignor cannot stop goods in transitu, when they are shipped, to pay a precedent debt. Neither can he stop them when the consignee is his own agent, if the goods are a shipment for a cestui que trust who has paid the consideration, and when once the bill of lading is signed by the master after the goods are on board, under such circumstances, the consignor and master cannot change the right of property by any change of the papers, so as to divest the interest already vested in the consignee. But where a shipment is made to a creditor on account and risk of the consignor, and there is no contract respecting it between the consignor and consignee, there the right of stoppage and transfer of the property continues, so that the creditor may be defeated by a transfer or countermand before the bill of lading reaches him. And a factor who is a creditor also, has no lien on goods consigned to him by his principal for ac-

count and risk of the shipper if before they get into his actual possession the consignor has *bonâ fide* assigned the bill of lading.—Story, note to American edition, p. 388.

Where a consignment is made to a factor for the account and risk of the consignor, and the bill of lading makes the goods deliverable to the consignee or his assigns, then the bill of lading must be indorsed by the consignee to pass the property to a purchaser, claiming in virtue of a transfer by such bill only; and an indorsement by the consignor would not operate a legal transfer of the bill of lading, so as to defeat the rights of third persons. As against the factor himself, or any other person claiming the goods by a *bonâ fide* transfer of the bill of lading, the consignor as owner, may assign the property by any legal instrument of assignment whatsoever, but then the party takes by such assignment, for an indorsement can only be made of the bill of lading by the party to whom or whose order it is originally made assignable, so as by virtue thereof to pass the property.—*Ibid.* p. 391.

9. If there is any dispute about the quantity or condition of the goods, or if the contents of casks or bales are unknown, the words of the bill of lading should be varied accordingly.

By the *French Ordinance*, it is required that bills of lading should contain the quality, quantity, and marks of the merchandize, the name of the merchant who loads them, and of the person to whom they are to be delivered, the place of departure and destination, the names of the master and the ship, and the price of the freight (*d*).

It is obvious that the quality, and frequently also the quantity of the goods must be unknown to the master; and the commentator (*e*) on the Ordinance informs us, that by the quality the exterior and apparent quality only is meant; and further, that it is usual for the master to insert words, denoting that the quality and quantity are only according to the representation of the merchant; of which practice he approves, and mentions two disputes decided in favour of the master in consequence of this precaution.

Some of the more ancient writers on maritime law, mention the case of goods put on board a ship, without the knowledge or consent of the master or owners. It is evident, that in such a case no contract for conveyance is made, but nevertheless the master, upon delivery of them, will be entitled to the usual freight for the voyage.

Having thus considered the several particulars, belonging distinctly to the two different species of contract, for the conveyance of merchandize by sea, I proceed in the following chapters of this fourth part, to treat of those general circumstances which may belong to both.

(*d*) Liv. 3, tit. 2, Des Connoissemens, art. 2. So also the Code de Commerce, art. 281.

(*e*) Valin, ubi supra. See also upon this subject, Boulay—Paty, vol. 2, 309, 313.

CHAPTER IV.

OF THE GENERAL DUTIES OF THE MASTER AND OWNERS.

1. IN whatever way the contract for the conveyance of merchandise be made, the master and owners are thereby bound to the performance of various duties of a general nature. I propose to treat of these duties in the present chapter, and shall consider them as they regard, FIRST, The Preparation for the Voyage; SECONDLY, The Commencement; THIRDLY, The Course; and, LASTLY, The Completion of the Voyage.

2. And, FIRST, as to the Preparation for the Voyage.

The first duty is to provide a vessel tight and staunch, and furnished with all tackle and apparel necessary for the intended voyage (*a*). For if the merchant suffer loss or damage by reason of any insufficiency of these particulars at the outset of the voyage, he will be entitled to a recompense (*b*).

§ The case of *Wedderburn v. Bell* (*c*), was an action on a policy of insurance on the ship *Minorca*, at and from *Jamaica* to *London*. The ship sailed from *England* with convoy, but parted from the fleet; and being no more heard of, was supposed to have foundered in a hurricane. The defence was, 1. That the ship was not properly equipped with sails. It appeared that her sails, to be used in stormy weather, were in good condition, but that her main-top-gallant sails and studding sails, which are useful in light breezes, were rotten and almost unserviceable. Lord *Ellenborough* said, "The hull of the ship in this case was sufficient and sea-worthy; but it appears that when she left *Jamaica*

(*a*) Emerigon, tom. 1, p. 373, 374, 375; Roccus, not. 19, 57, 69; Ordinance of Rotterdam, 2 Magens, p. 101, art. 124; Molloy, book 2, chap. 2, sect. 10; Wellwood's Sea Laws, tit. 7, p. 22.

(*b*) With respect to insufficiency of these particulars after the commence-

ment of the voyage, resulting from the negligence or default of the master and crew, as it affects the liability of insurers, see *Hollingsworth v. Brodrick*, 7 Ad. & Ell. 40, and *Dixon v. Sadler*, 5 M. & W. 405.

(*c*) 1 Campb. Rep. 1.

her sails were highly defective. It is not enough that a ship is supplied with such sails as are essential to her safety from the perils of the sea, and which might enable her, if not intercepted, at some period or other to complete her voyage. She must be rendered as secure as possible from capture by the enemy, as well as from the dangers of the winds and waves. But here the *Minorca* appears to have been deficient in sails, on which her speed might materially depend; and, if so, the risk being thereby greatly increased, the policy never attached, and this action cannot be supported." §

An insufficiency in the furniture of the ship cannot easily be unknown to the master or owners; but in the body there may be latent defects unknown to both. The *French* ordinance directs, that if the merchant can prove that the vessel, at the time of sailing, was incapable of performing the voyage, the master shall lose his freight, and pay the merchant his damages and interest (*d*). *Valin*, in his commentary on this article, cites an observation of *Weitson*, "That the punishment of the master in this case ought not to be thought too severe, because the master, by the nature of the contract of affreightment, is necessarily held to warrant that the ship is good, and perfectly in a condition to perform the voyage in question, under the penalty of all expenses, damages, and interest." And he himself adds that this is so, although before its departure the ship may have been visited according to the practice in *France*, and reported sufficient; because on the visit the exterior parts only of the vessel are surveyed, so that secret faults cannot be discovered, "for which, by consequence," says he, "the owner or master remains always responsible; and this the more justly, because he cannot be ignorant of the bad state of the ship; but even if he be ignorant, he must still answer, being necessarily bound to furnish a ship good and capable of the voyage." *Pothier* (*e*), taking notice of this article, and of the com-

(*d*) Liv. 3, tit. 3, Fret. art. 12.

(*e*) *Traité de Chartre-partie*, num. 30. The author here refers to his own excellent *Traité de Louage*, part 2, chap. 1, sect. 4, par. 2. But it rather appears to me that the rules there laid down by himself, warrant the conclusion, that in this instance the owner and master ought to be responsible for the loss, "Lorsque le lo-

cateur devoit par sa profession être informé du vice de la chose louée, il est tenu des dommages, intérêts du conducteur, sans qu'il soit besoin de chercher, si effectivement il en a eu connoissance ou non." And he instances the case of a cooper or shopkeeper, letting casks made of bad wood.

mentary upon it, declares his own opinion (in conformity, as he observes, to the general principles of law established in his own treatise on the contract of letting to hire) to be, that if the ship has been visited and reported sufficient, the master or owner shall not be answerable for damages occasioned by a defect, which they did not, nor could know; but he agrees that they shall lose their freight (*f*). It may be observed, however, that defects of this sort cannot exist, unless occasioned by the age or particular employment of the ship, or some accidental disaster that may have happened to it; all of which ought to be known to the owner, and ought to lead to an examination of the interior as well as exterior parts. And indeed this contract, although greatly partaking of the nature of the contract of letting to hire, is not precisely the same, but includes in itself a warranty beyond that which is contained in the contract for letting to hire. In a charter-party the person who lets the ship, covenants that it is tight, staunch, and sufficient; if it is not so, the terms of the covenant are not complied with (*g*), and the ignorance of a covenantor can never excuse him. And with regard to a general ship, Chief Justice *Holt*, in his elaborate argument on the law of bailments, distinguishes the contract made for the carriage of goods from the contract of letting to hire; and, speaking of the former, when made by a person in a public employment, says, "The law charges the person (*viz.* common carrier, hoyman, master of a ship,) thus entrusted to carry goods, against all events but acts of God and of the king's enemies;" so that a common carrier is an insurer against all perils or losses not within the exception (*h*). And the contract of insurance, properly so called, is clearly void, if the ship, at the commencement of the voyage, be not sea-worthy, although the person who has effected the insurance be ignorant of that circumstance (*i*).

(*f*) Le Capitaine perd son fret et, répond des dommages intérêts de l'affrèteur, si celui-ci prouve que, lorsque le navire a fait voile, il était hors d'état de naviguer. La preuve est admissible nonobstant, et contre les certificats de visite au départ.—Code de Commerce, art. 297

(*g*) The law of the United States of America is the same, see American Ed. p. 222. So also is the Scotch law.

"Such ordinary hazards as occur not by stress of weather, or any extrinsic accident, but only from the ship and her furniture, lie not upon the merchant, nor are relevant to free the skipper, who must have the ship sufficient at his peril."—1 Bell's Com. 4th Ed. 550.

(*h*) *Coggs v. Bernard*, 2 Lord Raym. 909.

(*i*) *Park on Insurance*, chap. 11.

Indeed in a case, in which it appeared that the owner of a lighter employed in conveying goods from a quay at *Hull* to sloops in the dock, had together with many other persons engaged in the same business, given public notice, "That they would not be answerable for any loss or damage which should happen to any cargo, which should be put on board any of their vessels, unless such loss or damage should happen or be occasioned by want of ordinary care and diligence in the master or crew of the vessel; when and in such case they would pay to the sufferers 10*l.* per centum upon such loss or damage, so as the whole amount of such payment should not exceed the value of the vessel on board whereof such loss or damage should have happened, and the freight of such vessel." And they gave further notice, "That any merchant or other person desirous of having their goods or merchandizes carried *free of any risk*, in respect of loss or damage, whether the same should happen from the *act of God or otherwise*, might have the same so carried by entering into an agreement for the payment of an *extra freight* proportionable to the accepted responsibility, on application to them or their respective agents." It was held that the owner was answerable to the full extent of the damage done to goods by reason of the leakiness and insufficiency of his lighter, although the merchant was acquainted with the notice before he sent the goods on board. In delivering the judgment of the Court on this occasion, the learned Chief Justice, Lord *Ellenborough* said, "In every contract for the carriage of goods between a person holding himself forth as the owner of a lighter or vessel ready to carry goods for hire, and the person putting goods on board or employing his vessel or lighter for that purpose, it is a term of the contract on the part of the carrier or lighterman *implied by law*, that his vessel is tight, and fit for the purpose or employment for which he offers and holds it forth to the public; it is the very foundation and immediate substratum of the contract that it is so; the law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so." And the Court considered the insufficiency of the lighter "as a personal neglect of the *owner*, or more properly as a non-performance on *his* part of what he had undertaken to do, viz., to provide a fit vessel for the purpose;" and thought it clear that the only object of the notice "was to limit the responsibility of the owners, in those cases only where the

law would otherwise have made them answer for the neglect of *others*, and for *accidents* which it might not be within the scope of ordinary care and caution to provide against" (j).

And not only must the ship and her furniture be sufficient for the voyage, but she must also be furnished at the time of sailing (k) with a competent master, and an adequate number of persons of skill and ability to navigate her.

§ The case of *Tait v. Levi* (l), was an action on a policy of insurance at and from *Cork*, to the ship's loading port or ports on the coast of *Spain*, within the straits of *Gibraltar*, including *Tarragona*, and *not higher up the Mediterranean*, and from thence to *London*. *Tarragona* was at this time in possession of our *Spanish* allies. *Barcelona*, which lies farther up the *Mediterranean*, was in possession of the *French* enemy. It was the intention of the captain to go into *Tarragona*, but being entirely ignorant of the coast he passed that port in the night, mistook *Barcelona* for *Tarragona*, and was entering the former port, when captured by the *French*. Lord *Ellenborough*, "There was no just cause for the deviation, it resulted solely from the master's ignorance. If he had been driven off *Barcelona* by stress of weather, it would have been a different consideration. I think the case against the assured. The implied warranty to provide a master of reasonably competent skill, was not complied with, by sending out one who was totally ignorant of the one port, and of the other, of *Tarragona* and of *Barcelona*, when it was the immediate and prominent object of the policy to distinguish between them.

And, for sailing down rivers, out of harbours, or through roads, &c. where, either by usage, or the laws of the country, a pilot is required, a pilot must be taken on board (m). But no owner or

(j) *Lyon and Another v. Mells*, 5 East, 428.

(k) *Forshaw v. Chabert*, 3 B. & B. 158, but see *Weir v. Aberdeen*, 2 B. & Ald. 320.

(l) 14 East, 481.

(m) *Law v. Hollingsworth*, 7 Term Rep. 160; *Phillips v. Headlam*, 2 B. & Ad. 384. And see the observations of Baron Parke on these cases, as they affect the liability of insurers in the case of *Dixon v. Sadler*, 5 M. & Wels. 405. *Emerigon*, tom. 1, p. 375; *Molloy*, book 2, chap. 2, sect. 7; *Roccus*, not. 59, 62: *French Ordinance*, liv. 2, tit. 1; *Du Capitaine*, art. 8.

Ordinance of Wisbuy, art. 59, 60	-	-	-	-	} As to Pilot.
Ordinance of Antwerp, 2 Magens, p. 16, art. 9	-	-	-	-	
Wellwood's Sea Laws, p. 23, 26	-	-	-	-	
Ordinance of Rotterdam, 2 Magens, p. 103, art. 139	-	-	-	-	
Ante, part 2, chap. 7.	-	-	-	-	

master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person whatsoever, from or by reason or means of no licensed pilot being on board, or of no duly qualified pilot being on board, unless it shall be proved that the want of such licensed or qualified pilot shall have arisen from any refusal to take such pilot on board, or from the wilful neglect of the master in not heaving to, or using all practicable means consistently with her safety, for the purpose of taking on board any pilot, who shall be ready and offer to take charge of the ship (*n*).

3. The manner of taking goods on board, and the commencement of the master's duty in this respect, depend on the custom of the particular place. More or less is to be done by wharfingers or lightermen, according to the usage. If the master receive goods at the quay or beach, or send his boat for them, his responsibility commences with the receipt (*o*). In the port of *London*, with respect to goods intended to be sent coastwise, it has been held that the responsibility of the wharfinger ceases by delivery of them to the *mate* of the vessel upon the wharf (*p*). As soon as any goods are put on board, the master must provide a sufficient number of persons to protect them (*q*); for, even if the crew be overpowered by a superior force, and the goods stolen, while the ship is in a port or river within the body of a county, the

(*n*) 6 Geo. 4, c. 125, s. 53. See Appendix.

(*o*) Molloy, book 2, chap. 2, sect. 2; Roecus, not. 88; Wellwood, tit. 9, Dig. 4, 9, 3.

(*p*) Corban and Another v. Downe, 5 Esp. N. P. C. 41.

(*q*) Morse v. Slue, 1 Vent. 190, 238; Sir T. Raym. 220; Rth v. Kneeland, Hob. 17; 2 Cro. 330; Dig. 4, 9, l. 1. "Nisi hoc esset statutum, materia daretur cum furibus adversus eos, quos recipiunt, cœundi, cum ne nunc quidem abstineant hujusmodi fraudibus." But the word *fures* here means *thieves* only, and not *robbers*, who come with a superior and irresistible force; *they* are called *latrones*, thus by the Digest, 17, 2, 52, 3. A partner, who has the care of the joint property is not answerable, "si id *latrocinio* aut incendio perierit," but he is answer-

able, "si a *furibus* subreptum sit;" upon which *Gothofred* observes, "adversus *latrones* parum prodest custodia; adversus *fures* prodesse potest, si quis advigilet. *Latrocinium* fatale damnum, seu casus fortuitus est; at non *furtum*." And the words of the Digest, title *Nautæ*, *caupones*, *stabularii*, &c., 4, 9, 3, are, "Nisi si quid damno fatali contingat; inde *La-beo* scribit, si quid naufragio, aut per vim piratarum perierit, non esse iniquum exceptionem ei dari; idem erit dicendum si in stabulo aut in *caupona* vis major contigerit." So that our law at present is stricter in the case of carriers than the civil law; but it is said to have been the same formerly, and not to have charged a carrier in the case of robbery, unless he travelled by dangerous ways, or at unreasonable hours.—See Jones on Bailments, p. 103.

master and owners will be answerable for the loss, although they have been guilty of neither fraud nor fault: the law in this instance holding them responsible from reasons of public policy, and to prevent the combinations that might otherwise be made with thieves and robbers.

It is usual for the master or mate, to sign a receipt for goods at the time of the shipment, and deliver it to the shipper. When this is done, the master must take care not to deliver a bill of lading until the receipt is returned to him; for otherwise he may place himself under a twofold responsibility; a responsibility to the shipper, in case he shall require the goods to be delivered to his own order, and have a legal right to do so; and a responsibility to a holder of the bill of lading, who may be induced to purchase the goods on the faith of it (*r*). And if such a receipt is required, it ought to be given, and if not given, still the master must take care not to deliver a bill of lading to any person but the shipper without his orders, for if he does, he may incur a twofold responsibility in the same way, as if the required receipt had been given (*s*).

It is in all cases the duty of the master to provide ropes, &c. proper for the actual reception of the goods into the ship (*t*). And if a cask be accidentally staved in letting it down into the hold of the ship, the master must answer for the loss (*u*). The ship must also be furnished with proper dunnage (pieces of wood placed against the sides and bottom of the hold) to preserve the cargo from the effects of leakage, according to its nature and quality (*v*). And care must be taken by the master (unless by usage or agreement this business is to be performed by persons hired by the merchant) so to stow and arrange the different articles, of which the cargo consists, that they may not be injured by each other or by the motion or leakage of the ship (*w*). And more must not be taken on board, than the ship can conveniently carry, leaving room for her own furniture and the provisions of the crew, and

(*r*) *Craven and Another v. Ryder*, 6 Taunt. 433, and 2 Marsh. 127; and see *Hawes and Another v. Watson and Another*, 2 B. & C. 540. See the cases, ante p. 281.

(*s*) *Ruck v. Hatfield*, 5 B. & A. 632.

(*t*) *Laws of Oleron*, art. 10; *Laws of Wisbuy*, art. 22; *Wellwood*, tit. 9.

(*u*) *Goff v. Clinkard*, cited 1 Wils. 282.

(*v*) *Ordin. of Rotterdam*, 2 *Magens*, 101, art. 125, 126.

(*w*) *Wellwood*, p. 29; *Ordin. of Antwerp*, 2 *Magens*, p. 16, art. 8; *French Ordin. liv. 2, tit. Du Capitaine*, art. 12; *Laws of Wisbuy*, art. 23; *Laws of Oleron*, art. 11, and *Cleirac* thereon.

for the proper working of the vessel (*x*). Neither may the master take on board any contraband goods, whereby the ship and other parts of the cargo may be liable to forfeiture or detention (*y*).

4. The master must also take on board no false or colourable papers, that may subject the ship to capture or detention (*z*); and he must procure and keep on board all the papers and documents required for the manifestation and protection of the ship and cargo by the law of the countries, from and to which the ship is bound, and by the law of nations in general, and treaties between particular states (*a*). The rule of the *French* ordinance on this subject is, that the master must have on board, the charter-party and other documents relating to the proof of his lading (*b*). *Valin*, in his commentary on the ordinance, says, that this article relates chiefly to a time of war, and that if a ship should be condemned as good prize on account of the master's failure in this respect, he must answer for the event. I have confined the rule in the manner above expressed, because it would be unjust to charge the master or owners for *some* cases of omission, upon which ships were condemned in *France* during the late wars, although the terms of the condemnation were such as to discharge the insurers from their responsibility, according to the established rule of the law of nations, which holds the sentence of a foreign court to be conclusive of the fact, upon which it is founded; and to which rule the Courts of justice in this country, adhered with the dignity belonging to regular and permanent establishments.

Where by the terms of a charter-party a number of days is appointed for the lading of the cargo, the master must not sail before the expiration of the time, and if a further period is allowed

(*x*) *Roccus*, not. 30; *Ordin. of Rotterdam*, 2 *Magens*, p. 102, art. 127; *Weir v. Aberdeen*, 329.

(*y*) *Molloy*, book 2, chap. 2, sect. 7; *Roccus*, not. 66; *Wellwood*, tit. 9.

(*z*) *Guidon*, chap. 5, art. 33; *Molloy*, book 2, chap. 2, sect. 9. See also *Horneyer v. Lushington*, and *Oswell v. Vigne*, 15 *East*, 46; *ibid.* 70, as to the effect of carrying simulated papers on a policy of insurance not containing permission so to do.

(*a*) The documents and papers expected to be found on board a neutral ship, are, 1, The passport, sea-brief, or

sea-letter. 2, The proofs of property, bill of sale, &c. 3, The muster-roll. 4, The charter-party. 5, The bills of lading. 6, The invoice. 7, The log-book. 8, The bill of health. See *Marshall on Insurance*, B. 1, c. 9, s. 6. As to the manifest or written contents required for the importation of goods into Great Britain, see 6 *Geo.* 4, c. 107, s. 3 to 7. As to the coasting trade, see same statute, s. 100 to 114.

(*b*) *Liv.* 3, tit. 1, *Charte-parties*, art. 10, and *Valin* thereon. See also *Pothier, Charte-partie*, num. 31.

by a clause of demurrage, he must wait that period also if required to do so.

5. Secondly, as to the commencement of the voyage.

All things being prepared for the commencement of the voyage, the master must forthwith obtain the necessary clearances or permission to sail from the officers of the customs or others appointed for the discharge of vessels, and pay (c) the necessary port and other charges for that purpose.

§ By the 3 & 4 Wm. 4, c. 52, entitled "*An Act for the general regulation of the Customs*," it is enacted:

That no goods shall be shipped or water-borne to be shipped on board any ship, in any port or place in the United Kingdom, or in the *Isle of Man*, to be carried beyond seas, before due entry outwards of such ship, and due entry of such goods shall be made and *cocket* granted, nor before such goods shall be duly cleared for shipment in manner thereafter directed, and that no stores shall be shipped for the use of such ship, except such as are borne on the victualling bill of such ship under pain of forfeiture (d).

That no ship on board of which any goods or stores shall have been shipped for parts beyond the seas, shall depart from such port until such ship shall have been *duly cleared* outwards for her intended voyage, under pain of forfeiture by the master of the sum of 100*l.* (e).

It may be useful to state in this place in what this "duly clearing" of a ship consists.

The master of every outward bound ship shall, upon application to an officer called the *searcher*, receive a *victualling bill*, for the shipment of such stores as he may require, and as shall be allowed by the collector and controllor for the use of the ship, according to the voyage upon which she is about to depart, and no articles taken on board shall be deemed to be stores, except such as shall be borne on such *victualling bill* (f). He shall also, before any goods be taken on board, deliver to the collector or controller, a certificate from the proper officer, of the clearance inwards or coastwise, of such ship of her last voyage, specifying what goods, if any, have been reported inwards for exportation, and also deli-

(c) Guidon, c. 5, art. 33; Molloy, book 2, chap. 2, sect. 9.

(d) Sect. 61.

(e) Sect. 62.

(f) Sect. 63.

ver to the collector or controller an account, signed by the master, or his agent of the entry outwards of such ship for her intended voyage, setting forth the name and tonnage of the ship, the name of the place to which she belongs if *British*, or of her country if foreign, the name of the master, of the place for which she is bound, and of the place in such port at which she is to take in her lading for the voyage. The particulars of such account shall be written and arranged in such form and manner, as the collector and controller shall require; and such account shall be the entry outwards of such ship, and shall be entered in a book to be kept by the collector, for the information of all persons interested. And if any goods be taken on board any ship before she shall have been entered outwards, the master shall forfeit the sum of 100*l*. If, however, it become necessary to lade any heavy goods, before the whole of the inward cargo is discharged, it shall be lawful for the collector and controller to issue what is called a *stiffening order* for that purpose (*g*).

Every person entering outward goods for export beyond the seas, shall deliver to the collector or controller a bill of the entry thereof, (fairly written, or fairly written in part, and fairly printed in part, 1 & 2 Vict. c. 113,) in words at length, expressing the name of the ship and of the master, and of the place to which the goods are to be exported, and of the person in whose name the goods are to be entered, and the quantities and proper denomination or descriptions of the several sorts of goods, and shall pay down any duties which may be due upon the exportation of any such goods, and such person shall also deliver at the same time one or more duplicates of such bill in which all sums and numbers may be expressed in figures, and the particulars contained in such bill shall be written and arranged in such form and manner as the collector and controller shall require, and thereupon the collector and controller shall cause a *cocket* to be written for such goods, making it known that such goods have been entered, and shall sign such *cocket*, and deliver it to the person who shall have made such entry, and who shall keep and be responsible for the proper use of the same (*h*).

Before any part of the goods for which any *cocket* shall have been granted, shall be shipped or water-borne, to be shipped, the

same shall be duly cleared for shipment with the *searcher*, and before any goods be cleared for shipment, the particulars of the goods for each clearance shall be indorsed on such *cocket*, together with the number and denomination or description of the respective packages, containing the same; and in the margin of such indorsement shall be delineated the respective marks and numbers of such packages, and to each such indorsement shall be subjoined in words at length, an account of the total quantities of each sort of goods intended in such indorsement, and the total number of each sort of package in which such goods are contained, distinguishing, &c. And all goods shipped or waterborne, to be shipped, not being duly cleared as aforesaid, shall be forfeited (i).

The person clearing such goods for shipment, shall upon each occasion produce the *cocket* so indorsed to the *searcher*, and shall also deliver a *shipping bill* or copy of such indorsement, referring by names and date to the *cocket*, upon which such *indorsement* is made, and shall obtain the order of the *searcher* for the shipment of such goods, which indorsement and *shipping bill* shall be written and arranged as the collector and controller shall require (j).

Before any ship shall be cleared outwards with goods on board, the master shall deliver a *content* of such ship to the *searcher*, setting forth the name and tonnage of such ship, and the place and places of her destination, and the name of the master, and also an account of the goods shipped on board, and of the packages containing such goods, and of the marks and numbers upon such packages, and also before the clearance of such ship, the *cockets* with the indorsements and clearances thereon, for the goods shipped, shall be finally delivered by the respective shippers of such goods to the *searcher*, who shall file the same together, and shall attach with a seal a label to the file, showing the number of *cockets* in the file, and shall compare the particulars of the goods in the *cockets* with the particulars of the goods in such *content*, and shall attest the correctness thereof by his signature on the *label*, and on the *content*, and the master of the ship shall make and sign a declaration before the collector or controller to the truth of such *content*, and shall answer to the collector or controller such questions concerning the ship, the cargo,

(i) Sect. 70.

(j) Sect. 71.

and the intended voyage as shall be demanded of him; and thereupon the collector or controller shall clear such ship for her intended voyage, and shall notify such clearance, and the date thereof upon the *content* and upon the label to the file of cockets, and upon the victualling bill, and also in the book of ships' entries outwards, for the information of all parties interested, and shall transmit the *content* and the *cockets*, and the *victualling bill* to the searcher (*k*). The *file of cockets* and the *victualling bill* shall thereupon be delivered by the searcher to the master of such ship, and such *file of cockets* and *victualling bill* so delivered, shall be kept by the master of such ship, as the authority for departing from the port with the several parcels and packages of goods and of stores on board, so far as they shall agree with the particulars in the indorsements on such *cockets*, or with such *victualling bill* (*l*). §

Having complied with these regulations, the master must commence his voyage without delay, as soon as the weather is favourable (*m*). But he must on no account sail out during tempestuous weather (*n*). By most of the ancient marine ordinances (*o*) the master is required before he hoists sail to consult his mate, pilot, and others of the crew, as to the wind and weather (*p*), but I apprehend such consultation is not required by the law of *England*, according to which the entire management of the ship is intrusted to the master.

6. If there has been an undertaking or warranty to sail with convoy (*q*), the vessel must repair to the place of rendezvous for that purpose, and the master must put himself under the pro-

(*k*) Sect. 78.

(*l*) Sect. 79.

(*m*) *Anto.* chap. 1 of this part, sect. 10 & 11; *Ordin. of Rotterdam*, 2 *Magens*, p. 102, art. 128.

The *Ordin. of the Hanse Towns* allows two or three days.

(*n*) *Molloy*, book 2, chap. 2, sect. 4; *Roccus*, not. 56.

(*o*) See *French Ordin.* art. 15, *Jugemens d'Oleron*, cited by *Valin* in his *Commentaries* on it.

"The master should ask counsel at his fellows in making of sail, and gif some of them sayis that the weddar is gude, and some sayis the contraire, the master

should accord with the maist part, and gif he does otherwise, and ocht cum to the ship but gude, the master should pay the skaith gif he has guhairwith."—*Balfour*, 1 *Bell's Commentaries*, 554.

(*p*) *Wellwood*, tit. 8, p. 26; *Ordin. of Antwerp*, 2 *Magens*, p. 17, art. 11; *Emerigon*, tom. 1, p. 376.

This author also observes, that although the master is bound on this and other occasions to ask the advice of his crew, yet he is not bound to submit blindly to it if it is bad, or if under the circumstances it appears to be bad.

(*q*) The cases relating to convoy will be found at the end of this section.

tection and control of, the ships of war appointed under the authority of the government for the guard of merchant vessels, bound to the place of his destination. A warranty that the vessel shall sail with convoy is very common in a policy of insurance, and in that case, if it be not complied with, the insurance becomes absolutely void, and the insurers are not answerable for a loss happening by tempest or other accident wholly independent of the subject of the warranty, for which they would otherwise be liable, nor in many cases bound to return the premium; but if the warranty be made by the master or owner to the merchant, and not complied with, the master or owner may be responsible for a loss happening by tempest or other accident, for which otherwise the master or owner would not be liable; and even if the ship arrive safe, may be bound to compensate the merchant for the loss of the advantage of return of premium (*r*). The merchant having trusted to this warranty of the master or owner, and in confidence of its performance, made a similar warranty in his contract with the insurers, and having lost the benefit of his insurance, or of a return of premium, by the breach of the warranty on the part of the master and owners, has a right to receive from them whatever he has lost by their misconduct. This warranty has been so fully and ably treated by Mr. *Park*, (*s*), in his valuable book on Insurance, that I should forbear to enter upon it here, did not a reference to the several decided points and authorities on the subject appear absolutely necessary in this place.

The convoy must be a ship or ships of war appointed under the authority of the government, that is, immediately by the government, or by the commander in chief on a particular station. The protection of a ship of war accidentally bound on the same voyage, although discharging the office of a convoy, is not a convoy within the meaning of this warranty (*t*).

But this warranty to sail or depart with convoy, does not mean that the vessel shall depart with convoy immediately from the lading port, but only from the place of rendezvous appointed for

(*r*) *Sanderson and Others v. Busher*, 4 Campb. 54, in note.

(*s*) *Park on Insurance*, chap. 18. The same subject is also very fully discussed in Mr. Serjeant Marshall's excellent treatise

on the Law of Insurance, published about the same time as the first edition of this book.

(*t*) *Hibbert v. Pigou*; *Park on Insurance*, chap. 18.

vessels bound from that port. From many ports, and among others from the port of *London*, no convoy ever sails. It has therefore been held sufficient for a vessel bound from *London*, to sail with convoy from the *Downs* (u); and even from *Spithead*, when there was no convoy appointed at the *Downs* (v). It has also been held that a vessel is not bound to put herself, between the loading port and place of rendezvous, under the protection of a convoy intended for ships *on other destinations* (w).

Neither does it require the vessel to sail with convoy bound to the precise place of her destination. But if the vessel sail with the only convoy appointed for vessels going to the place of her destination, it is sufficient. Thus, where a policy had been affected on goods on board a ship called the *Little Betsey*, on a voyage at and from *London* to *Saint Sebastian* in *Spain*, warranted to depart with convoy for the voyage, and at the trial of an action brought against the underwriters, it appeared that no convoy was appointed directly to *Saint Sebastian*, but that the *Little Betsey* sailed under convoy of a squadron of frigates, the commander of which had orders from the Admiralty to take with him the *Weazle* and another frigate, and proceed to *Gibraltar*, and to take with him such ships as should be at *Spithead* bound to *Bilboa* (which is very near and in the course to *Saint Sebastian*) and to detach the *Weazle* with the latter, with orders to see them safe to *Bilboa*; and on the voyage the commodore made a signal for the *Weazle* to part company, and take with her such ships as were bound to *Bilboa* and *Saint Sebastian*, in obedience to which the *Weazle* parted company, and took with her the *Little Betsey* and other ships bound for *Bilboa* and *Saint Sebastian*, but soon after parted with them in chace of a strange ship, and did not afterwards join them; a jury of merchants, to whom Chief Justice *Eyre* left the question, determined this to be a sailing with convoy according to the meaning of the warranty, and the Court of Common Pleas afterwards approved of the verdict (x).

In the case just quoted, the convoy under which the vessel sailed, was in effect the convoy for the whole voyage, although

(u) *Lethulier's case*, 2 Salk. 443.

(v) *Gordon v. Morley*, 2 Stra. 1265.

(w) *Warwick v. Scott*, 4 Campb. 62.

(x) *D'Eguino v. Bewicke*, 2 Hen. Black. 551.

not intended actually for *Saint Sebastian*. It sometimes happens that the force first appointed is to accompany the ships only for a part of their voyage, and to be succeeded by another; at other times a small force is detached from the main body to bring them up to a particular point; if a vessel sail under the protection of the force thus appointed (*y*), or detached (*z*), the warranty is satisfied.

But this warranty requires not only that the vessel shall commence the voyage under the protection of the convoy, but also that she shall continue during its course under the same protection (*a*), unless prevented from so doing by tempest or other unavoidable accident, in which cases the master and owners will be excused, if the master does all that is in his power to keep the benefit of the convoy (*b*).

Neither is it sufficient for the master to sail in company with the ships of war appointed as the convoy, but he must before the departure obtain, or at least use all due diligence to obtain, the sailing instructions and orders delivered out by the commander of the convoy to the masters of the trading vessels, that are to sail under his protection. The necessity of obtaining such orders, if possible, is fully established by the two cases of *Webb v. Thomson* (*c*), and *Anderson v. Pitcher*, in the Court of Common Pleas (*d*); in the last of which Lord *Eldon* observes: "It being once decided, that a convoy within the terms of the policy, means a convoy appointed by government, it seems to follow of necessity that the ship must depart with sailing instructions, if by the due diligence of the master they can be obtained. The value of a convoy appointed by government in a great measure arises from its taking the ships under control as well as under protection. But that control does not commence until sailing instructions have been obtained; nor can it be enforced otherwise than by their means. Indeed, the reason of that rule, which requires that the convoy should be appointed by government, shows the necessity of having sailing instructions; * since without them the ship does not stand in that relation, or under those circumstances, in

(*y*) *Smith v. Readshaw*, Park, chap. 18; *De Garay v. Clagget*, *ibid*.

(*z*) *Manning v. Gist*, Marshall, book 1, chap. 8, sect. 4; *Audley v. Duff*, 2 Bos. & Pull. 111.

(*a*) *Lilly v. Ewer*, Doug. 72.

(*b*) *Jeffrey v. Legendra*, Carth. 216; 3 Lev. 320.

(*c*) *Webb v. Thomson*, 1 Bos. & Pull. 5.

(*d*) *Anderson v. Pitcher and Wife*, 2 Bos. & Pull. 164.

which she can take the full benefit of the government convoy. If the fleet be dispersed by a storm, how is she to learn the place of rendezvous? If it be attacked by the enemy, how is she to obey signals? In short, what communication can the protected have with the protecting force? It has been contended, that if she be under the protection of the guns, it is sufficient. But will it be contended that, provided she be under the protection of the guns at her departure, though sailing instructions be never obtained during the voyage, or not till the last day of the voyage, the warranty is complied with? Either sailing instructions are not necessary, or, if they be necessary, they must be so at some given period, and can only be dispensed with in some particular cases. Then can any other period be assigned but the beginning of the voyage?"

Each of these two cases arose from the loss of the same vessel, the *Golden Grove*, which had been insured at and from *London*, to the *West Indies*, with leave to go to the place of rendezvous to join convoy, and warranted to sail from thence with convoy for the voyage; and in the last of them, in which the facts are most fully stated, it appeared that the ship arrived at *Spithead* about nine o'clock in the morning of the 15th November, 1795; that she came round under the care of the first mate, the captain himself being on shore at *Portsmouth*; that on the preceding day, (the 14th) sailing instructions were delivered at *Portsmouth* to all such ships as applied regularly for them; and that the captain of the *Golden Grove*, previous to her arrival, made inquiry concerning sailing instructions but found that they could not be obtained until the ship was actually in sight, that on the 15th of *November*, by daylight, Admiral Sir H. C. *Christian*, the commander of the convoy, got under weigh, but had not entirely quitted the roadstead until about four o'clock in the evening: and when he got under sail, he left the *Trident* frigate to bring up such vessels as did not weigh anchor with him; that about one o'clock of the same day, the captain of the *Golden Grove* repaired on board, and got under weigh, at which time the *Trident* had also got under weigh, and both the admiral's ship and the *Trident* had then proceeded so far, that it was clear the *Golden Grove* could not overtake the former soon enough for the captain to go on board that night, and it was even doubtful whether he could overtake the latter. That on the next day between ten and twelve o'clock in the forenoon, the captain of the *Golden Grove*, being only a quarter of a mile from the admiral's ship,

went on board her, and obtained sailing instructions: that soon after the *Golden Grove* was lost, having been from the time of her departure to that of the loss, under the protection of the convoy. Upon this state of facts, it was held that the warranty was not complied with; for either the ship had not arrived time enough to obtain sailing instructions, or if she had arrived time enough, her captain had not used the necessary endeavours to obtain them before she sailed.

If the ship do not quit her moorings until a few hours after the convoy, and in consequence of the occurrence of a calm and heavy sea is prevented from joining the convoy, it will not be an excuse for the master to show that he made every practicable exertion to come up with the convoy, and would have done so without difficulty if the wind had continued as it was at the time when he left his moorings (*e*).

On the other hand, if the master do all in his power to obtain sailing instructions, but is prevented from obtaining them by the badness of the weather (*f*); or if they are refused by the commander of the convoy (*g*); the warranty is complied with.

So, where by the terms of a policy of insurance on a ship at and from *Portneuf* to *London*, a part of the premium was to be returned, if the ship sailed with convoy on or before the 31st of *October*; and it appeared that vessels sailing from *Portneuf* must clear at *Quebec*, and that the ship arrived at *Quebec* on the 28th of *October*, and obtained her clearances on the 29th, but could not procure a pilot to carry her down the river *St. Lawrence* till the 30th, on which day she joined the convoy some leagues below *Quebec*, but within the limits of that port, and cleared the port with the convoy on the 31st; it was held that the insurers were entitled to a return of premium, although the convoy had left *Quebec* on the 28th, having laid to for vessels that had not been able to join; the master who had gone from *Portneuf* to *Quebec* by land, had received his sailing instructions on the 27th of the month (*h*). And where the master, in consequence of waiting for particular goods, did not leave his moorings until after the convoy, and was not able to join, having done all he could for that

(*e*) *Sanderson and Others v. Busher*, 4 Campb. 54, in note.

(*f*) *Victorin v. Cleve*, 2 Stra. 1250. The cause was tried before Ch. J. Lee at Guildhall.

(*g*) *Veeton v. Wilmot*, by Ch. J. Lee at Guildhall; Park, chap. 18, p. 444. notis.

(*h*) *Ridsdale and Others v. Shedden*, 4 Campb. 107.

purpose, he was held not liable to an action at the suit of the owner of those goods (*i*).

7. The necessity of sailing under convoy does not at all times depend merely upon a special undertaking or warranty for that purpose: during war it has been thought expedient by the legislature of different states, to compel merchant vessels, in many cases, to place themselves under this protection as a measure of public policy, to prevent the enemy from enriching himself by their capture (*j*). This was done by the Legislature of this country during the late wars (*k*). And it might be considered as a general rule, liable to some exceptions allowed by statute, that a private merchant vessel should not sail on a foreign voyage without convoy, unless previously licensed so to do. For it was in the first place enacted in general terms, that it should not be lawful for any ship belonging to his Majesty's subjects (except as therein provided,) to depart from any port or place whatever, unless under such convoy as might be appointed for that purpose (*l*). And the master was required to use his utmost endeavours to continue with the convoy during the whole voyage, or such part thereof as it should be directed to accompany his ship, and not to separate therefrom without leave of the commander, under very heavy pecuniary penalties (*m*). And in case any ship should depart without convoy, contrary to the act, or wilfully separate therefrom, all insurances on the ship, cargo, or freight, belonging to the master, or to any other person who should have directed or been *privy* to such departure or separation, were made null and void (*n*). And the officers of the Customs in *Great Britain* and *Ireland*

(*i*) *Magelhaens v. Busher*, 4 Campb. 54.

(*j*) A very full account of the regulations made at different times in France on the subject of convoy, is given in Valin's Commentary on the French Ordinance, tom. 1, p. 691, by which it appears that at particular periods, merchant ships have been absolutely forbidden to sail without convoy, under very severe penalties on the master and owners; and that, whenever convoy was required, the master was to bring his ship to the rendezvous, and receive sailing instructions, (*ordres pour la route*,) from the commandant, and obey his orders, and not separate

from him. The Ordinance of Hamburg, of the year 1731, tit. 4, art. 4, requires the master to receive a letter of instructions from the commander of the convoy, 2 Magens, 214.

(*k*) 38 Geo. 3, c. 76, and 43 Geo. 3, c. 57.

(*l*) 43 Geo. 3, c. 57, s. 1.

(*m*) Id. sect. 2 and 3.

(*n*) Id. sect. 4. A person who put goods on a ship, advertized as a running ship, which was captured on her voyage, was held to have lost the benefit of his insurance, it being held that he was *privy* to the ship's departure without convoy, and that to be *privy* was sufficient

were required not to allow any ship, which ought to sail with convoy, to clear outwards from any place in the *United Kingdom* to *foreign parts*, until the master should have given bond with one surety, with condition that the ship should not depart without convoy, contrary to the directions of the act, nor afterwards desert or wilfully separate therefrom (*o*).

8. The constructions put upon an undertaking to sail with convoy, were in general found to be the true construction of the Acts of Parliament (*p*). As similar statutes may be expected to pass whenever this country shall again unhappily be engaged in war, it has been thought right to notice here the decisions that took place on the former acts.

The ship *Maximilian*, bound from *London* to *Quebec*, arrived at *Portsmouth* a few hours after the *Quebec* convoy had sailed from thence for *Falmouth*, under orders to lie to, and call for ships off that port. The ship remained at *Portsmouth* for sixteen days, and then sailed with a *Mediterranean* convoy, that would protect her as far as the *Azores*, and was never heard of afterwards. In an action on a policy of insurance effected by the owner, who was privy to this sailing, it became a question, whether this was a sailing under convoy within the meaning of the act; and the Court held that it was not (*q*). It was contended, that the *Mediterranean* convoy was a sufficient convoy to satisfy the act; or, if it were not, then that the ship might be presumed to have sailed in pursuit of the *Quebec* convoy, which it was argued she might lawfully do. But the Chief Justice (*r*) said, "on the whole purview of the act, it appears that the sailing with convoy, which it requires, must be a sailing with convoy for the voyage, or for so long a part thereof as convoy is appointed to go." "The master sailed from *Portsmouth* to *Falmouth* without a convoy, bound for *Quebec* (*s*). It is argued that he may sail from port to port without convoy; but the act does not say that, unless the ship *was bound* from port to port: the exception in the sixth section is for vessels *bound* from port to port. The next argument used is, that the captain may legally endeavour to over-

for this purpose, without being instrumental. *Wainhouse v. Cowie*, 4 Taunt. 178.

(*o*) 43 Geo. 3, c. 57, s. 5.

(*p*) By Lawrence, J., 1 Taunt. 253.

(*q*) *Cohen v. Hinckley*, 1 Taunt. 249.

(*r*) Sir James Mansfield.

(*s*) And also without a convoy appointed for the *Quebec* ships which might have been sufficient. See *D'Eguino v. Bewicke*, ante, p. 308.

take the convoy; but if he may try at all, why may he not continue to try, till the convoy is arrived within the last ten miles, or even the last mile of the voyage. Such a construction would wholly defeat the purposes of the act: this then is a sailing contrary to the act, and avoids the policy." Mr. Justice *Heath* observed there was no evidence of any sailing instructions having been given to the ship (*t*). Mr. Justice *Chambre* observed, that though the act was to many purposes penal, yet it was to certain purposes a remedial act, directed to a great object of public policy, and the Court could not do it away on account of the hardship of the case.

The ship *Providence* being about to sail from *London* to *Madeira*, and being represented to be armed with six carriage guns, and manned with twelve men and boys, a license was obtained for her sailing without convoy, *provided she should be armed and manned in the manner before mentioned*. She had her complement on board in the port of *London*, but five men were discharged; and on the 5th of *October* the ship cleared out for *Madeira*; and on the 11th of *February* she sailed from the *Downs* for *Portsmouth*, where, if any where, she would have found and joined convoy for *Madeira*. On the 13th of *February* she was captured off *Shoreham*, having only seven men on board. No bond was given upon the ship's clearing out. At that time, the owners had not determined whether or no they should avail themselves of their license: if upon the ship's arrival at *Portsmouth* a convoy was found ready to sail, it was intended that the ship should be placed under its protection: if such convoy should not be found, it was intended to complete the crew to the number required by the license, and to sail under the license. The legality of this transaction was questioned in an action upon a policy of insurance; and the Court held it to be illegal. The license could not legalize the ship's departure and proceedings, because its condition was not complied with; and although the ship might lawfully have sailed to *Portsmouth*, as the place of rendezvous, if it had been intended that she should sail with convoy, yet in that case a bond was necessary, and none had been given, so that in effect this was a departure without license, and without convoy (*u*).

(*t*) See *Webb v. Thomson*, and *Anderson v. Pitcher and Wife*, ante, p. 309.

(*u*) *Hinckley v. Walton*, 3 Taunt. 131.

The ship *Ocean* was chartered for a voyage from *Hull* to *Palermo*, *Messina*, or *Malta*, and was destined accordingly. A license was obtained for her sailing without convoy from *Hull* to *Gibraltar*, in which she was described as bound on a voyage to *Gibraltar*; she did not in fact take in any goods for *Gibraltar*, but she obtained clearances for *Gibraltar*, *Malta* and *Messina*. Written instructions were given to the master to proceed to *Spit-head*, and there to make inquiries about convoy, and if he should find a convoy appointed for the *Mediterranean* on the point of sailing, to take advantage of it; but not to receive instructions until it should be actually under weigh, that he might be at liberty to pursue his voyage singly, should the convoy not sail the moment the wind should be fair: in that case he was to make his way direct to *Palermo*, without touching either at *Gibraltar* or any other port. If, however, in passing *Gibraltar*, he should be ordered into the Bay by any of the cruizers, in order to join convoy bound upwards, he must comply; but not otherwise; as his great object must be to get to *Palermo* as soon as possible. The ship sailed without convoy, and arrived in the *Gut of Gibraltar*, and the master was obliged by stress of weather to put into *Gibraltar*, where he remained ten days, and inquired for convoy upwards; but finding no convoy, and there being no person authorized to appoint convoys or to grant licenses, he sailed again for *Palermo*, and was captured on the way thither. The course of navigation to *Palermo* and *Gibraltar* is the same as far as the *Gut of Gibraltar*. Convoys for *Sicily* and other places in the *Mediterranean* frequently sailed from *England*. In an action on a policy of insurance the legality of this voyage also was questioned; and it was contended that the voyage was legal, because there was a license to proceed to *Gibraltar* without convoy, and the further prosecution of the voyage from that place, was within the exceptions of the statute; but the Court held the voyage to be illegal, the ship not having in fact sailed for *Gibraltar*, as her license imported (*v*). It is obvious that the parties interested in this voyage, and also in that of the ship *Providence*, were endeavouring to evade the law, and they met with the fate that usually

(*v*) *Ingram and Others v. Agnew*, 15 4 Taunt. 178, and *Darby v. Newton*, 6 East, 517. See also *Wainhouse v. Cowie*, Taunt. 544.

awaits attempts of that nature ; they found the law too strong for them.

The *Triumph* sailed with convoy from *Cork*, in 1811, returned to that port with the convoy, sailed with it again, and putting back in distress the convoy proceeded without her. Being repaired, she sailed ultimately on the voyage without convoy, or having obtained a license to sail without. Under these circumstances the ship was held to have literally complied with the provision of the statute, and when leaving the port of *Cork*, for the third time, to have lawfully sailed on her voyage, without waiting for the next convoy from that port, or joining convoy from any other port (*w*).

The ship *Sir Sydney Smith*, bound from *London* to *Berbice*, sailed with a fleet for the *West Indies*, under convoy, and arrived therewith off *Madeira*, on Saturday the 17th *October*. The master was to land goods at *Madeira*, and take some wine on board there, he began to land the goods as soon as he arrived, but not being allowed to work on the Sunday, he had not got the wine on board till the Monday at noon, the convoying ship with the greatest part of the fleet sailed away on the Sunday, and was too far off to be overtaken. Some other ships were left behind at *Madeira*, and all agreed to sail together for mutual protection. The *Sir Sydney Smith* however was afterwards separated from them and captured. An owner of some goods insured was on board during the voyage, and afterwards brought an action on his policy. The cause was tried before Lord *Ellenborough*, who expressed himself to be clearly of opinion that the underwriters were discharged on the ground of deviation, but said he was inclined to think this was not a wilful desertion of the convoy within the meaning of the act, as the master appeared to have acted *bonâ fide*, and not to have been aware of the precise time when the convoy sailed from *Madeira* (*x*).

But a merchant who having covenanted to furnish a full cargo in the *West Indies*, to a ship on a voyage from *Liverpool* to the *West Indies* and back, furnished a partial cargo only, was held liable to an action on his covenant, although the ship sailed from *Liverpool* without convoy, and without being manned in the manner spe-

(*w*) *Laing v. Glover*, 5 Taunt. 49.

(*x*) *Williams v. Shee*, 3 Campb. 469.

cified in a license that had been obtained for sailing without convoy, it not appearing that at the time of the contract of affreightment, the parties contemplated a disobedience of the Act of Parliament (y).

9. Thirdly, as to the course of the voyage.

Having commenced his voyage, the master must proceed to the place of destination, without delay, and without stopping at any intermediate port, or deviating from the straight and shortest course, unless such stopping or deviation be necessary to repair the ship from the effects of accidents or tempest, or to avoid enemies or pirates, by whom he has good reason to suspect that he shall be attacked, if he proceeds in the ordinary track, and whom he has good reason to hope that he may escape by delay or deviation, or unless the ship sail to the places resorted to in long voyages for a supply of water or provisions by common and established usage (z). § By the French ordinance (a) the master is expressly prohibited from entering, without necessity, into any foreign port, and if driven there by a tempest, or by pirates, he is enjoined to set sail again, on the first favourable opportunity; and by the Code de Commerce, if, during the course of a voyage, the captain is compelled to enter a port, he must, if a French port, go before the President of the Tribunal of Commerce, or the "Juge de Paix," to declare his reasons for so doing; in a foreign port, before the French Consul. § If the ship is captured in consequence of deviation, the merchant is entitled to recover from the owner, the prime cost of his goods, with the shipping charges, but no more, without direct proof that the goods, at the time of the loss, were enhanced in value beyond the amount before mentioned, although the merchant may have effected a policy of insurance thereon (b). § This decision has been questioned by a very learned writer (c), who suggests, that the value of the goods are at least enhanced by the sums expended in transporting them so far, including the premiums paid for the insurance, the benefit of which is lost by the wrongful act of the defendant. §

(y) *Wilson v. Foderingham*, 1 M. & S. 468.

(z) *Davis v. Garrett*, 6 Bing. 716; *Freeman v. Taylor*, 8 Bing. 120; *Mount v. Larkins*, 8 Bing. 100; *M^cAndrew v. Adams*, 1 B. N. C. 29; *Palmer v. Marshall*, 8 Bing. 317; *Medeiros v. Hill*, 8

Bing. 231; *Roccus de Assec.* note 52; *Park on Insurance*, c. 17.

(a) *Liv. 2. Tit. 1. Art. 24.*

(b) *Parker v. James*, 4 Campb. 112.

(c) The Author of the Articles on Mercantile Law,—in the *Law Magazine*, No. xvii.

And if, during an unnecessary deviation, the goods put on board the ship be lost or damaged, the owner will be responsible for the injury, although it be not proved to have been caused by the deviation.

In the case of *Davis v. Garrett* (d), the plaintiff put on board the defendant's barge, lime, to be conveyed from the *Medway* to *London*. The master of the barge deviated, unnecessarily, from the usual course, and during the deviation a tempest wetted the lime, and the barge taking fire thereby, the whole was lost.

It was contended for the defendant, that the cause assigned for the loss of the lime was too remote to entitle the plaintiff to sue—that it could not be averred, with certainty, that the deviation was even the remote cause of the loss, for the barge might have encountered, and probably would have encountered, the same storm if she had proceeded in a direct course; but Lord Chief Justice *Tindal*, in delivering the judgment of the Court of Common Pleas, said—

“ The objection taken is, that there is no natural or necessary connection between the wrong of the master in taking the barge out of its proper course, and the loss itself. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet, in *Parker v. James* (e), where the ship was captured in the act of deviation, no such ground of defence was even suggested. Or, again, if the ship strikes against a rock, or perishes by storm, in the one course, no one can predicate that she might not equally have struck upon another rock, or met with the same or another storm if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant, who had by mistake forwarded a parcel by a wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is, that no wrong doer can be allowed to qualify or apportion his own wrong; and that as a loss has actually happened whilst his wrongful act was in opera-

(d) 6 Bing. 716.

(e) 4 Campb. 112.

tion and force, and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss if his wrongful act had never been done. It admits of a different construction, if he could show, not only that the same loss might have happened, but that it *must* have happened if the act complained of had not been done."

If a particular route be prescribed by charter-party, the master must pursue it—if the ship be destined to several places, he should sail to them in the order designated (*f*), or which may be usual—making such intermediate rests and stages only in the course of his voyage as the ordinary convenience of his employers, and the nature of the ship's service, may require (*g*). § If she be driven into a port out of the course of the voyage by tempest, or the master sail thither for any of the before-mentioned reasons, he must wait no longer than necessity requires, but sail again without delay; and for that purpose supply his ship with the requisite necessaries or repairs as expeditiously as possible.

While a vessel is detained at a port of necessity, it seems to be no deviation to take in an additional cargo, if no additional delay or risk is occasioned thereby.

In an action on a policy of insurance on ship and freight from *Spain* to *London*, with liberty to touch and stay at any port or place whatever, without being deemed a deviation, the ship was obliged to put into *Gibraltar* for provisions, and, while she lay there, received some chests of dollars on board on freight, which occasioned no delay. It was objected, that as there was no liberty to trade, the underwriters were discharged; but the Court held, that as there had been no delay, nor any increase or alteration of the risk, the plaintiff was entitled to recover (*h*).

So where a ship, insured, from *Stockholm* to *New York*, with a cargo of sheep, having touched at *Elsineur* for convoy, and to pay the sound dues, took in a fresh supply of provender for the sheep, without thereby occasioning any delay. The Court held that the underwriters were not discharged (*i*) §.

(*f*) *Max v. Roberts*, 12 East, 89.

(*g*) *Beatson v. Haworth*, 6 Term Rep. 531.

(*h*) *Raine v. Bell*, 9 East, 195; overruling the nisi prius decisions of *Stitt v. Wardell*, 1 Esp. 610, and *Sheriff v. Potts*, 5 Esp. 96. See also *Phillips on Insur-*

ance, c. 12, p. 200, 201; and Mr. Justice Story's note to the American edition of this work.

(*i*) *Cormack v. Gladstone*, 11 East, 347. See also *Laroche v. Oswin*, 12 East, 131.

If the ship has the misfortune to meet with enemies or pirates, the master must perform the part of a valiant man, and make the best resistance which the comparative strength of his ship and crew will allow (*j*).

By the treatise called the *Guidon*, it is declared, that if the master, by connivance with robbers, or by his entreaties, obtain from them any part of the cargo, by way of payment of his freight, he shall restore such part to the merchant, receiving the freight due in respect of it. And if the robbers pay him the freight of his ship, he shall give an account of the money paid, and the money shall be distributed by way of general average between the goods stolen and the freight or the ship (*k*). I have already mentioned the provisions of the *English* legislature on this subject (*l*).

10. If by reason of the damage done to the ship, or through want of necessary materials, she cannot be repaired at all, or not without very great loss of time, the master is *at liberty* to procure another ship to transport the cargo to the place of destination (*m*). But if his own ship can be repaired, he is not *bound* to send the cargo by another, but may detain it till the repairs are made, and even hypothecate it for the expense of them: that is, supposing it not to be of a perishable nature; if it be of such a nature, and there be not time or opportunity to consult the merchant, he ought either to tranship or sell it, according as the one or the other will be most beneficial to the merchant (*n*). So, if the ship has been wrecked, and the cargo saved. And if on the high seas, the ship be in imminent danger of sinking, and another ship apparently of *sufficient ability*, be passing by, the master may remove the cargo into such ship, and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss.

The disposal, however, of the cargo by the master, is a

(*j*) Ordinance of the Hanse Towns, art. 35, 36, 37; *Roccus*, not. 70; ante, part 2, chap. 5, sect. 4. See *Taylor v. Curtis*, 6 Taunt. 608.

(*k*) *Guidon*, chap. 6, art. 2, p. 229.

(*l*) Ante, part 2, chap. 5.

(*m*) *Laws of Oleron*, art. 4, and *Cleirac thereon*; *French Ordin.* liv. 3, tit. 3; *Fret*, art. 11, and *Valin thereon*; *Molloy*, book 2, chap. 4, sect. 5; *Ordin. of Ant-*

werp, 2 *Magens*, p. 14, art. 3; *Ordin. of Rotterdam*, 2 *Magens*, p. 104, art. 147, 148. See also the judgment delivered by Lord Mansfield in the case of *Luke v. Lyde*, 2 Burr. 889.

(*n*) See the judgment pronounced by Sir W. Scott, in the case of the *Gratitude*, *Mazzola*, 3 Robs. Ad. Rep. p. 240.

matter that requires the utmost caution on his part. He should always bear in mind that *it is his duty to convey it to the place of destination*. This is the purpose for which he has been intrusted with it, and this purpose he is bound to accomplish by every reasonable and practicable method. Every act that is not properly and strictly in furtherance of this duty, is an act for which both he and his owners may be made responsible ; and the law of *England* does not recognize the authority of any tribunal, or officer, acting upon *his* suggestion or at *his* instance ; but will scrutinize *their* acts as much as his own (o).

The hypothecation of the cargo is allowed by the marine law, and by the law of *England* also ; but it is allowed in those cases only in which it is made in furtherance of this purpose. The sale of a part has been allowed : but it was allowed in a case in which the hypothecation of the whole would have been lawful, and because it was considered as a matter equivalent to such hypothecation. Hypothecation imports a pledge without immediate change of possession (p), it gives a right to the party who makes advances upon the faith of it, to have the possession, if his advances are not repaid at the stipulated time, but it leaves to the proprietor of the things that may be hypothecated, the power of making such repayment, and thereby freeing them from the obligation. It is, therefore, (as hath been before observed (q),) contrary to the nature of this proceeding, and consequently contrary to the duty, and beyond the power, of the master to engage that the lender shall at all events have the goods delivered at their place of destination to him or his agents, to be there sold and disposed of by him or them, without reserving the right of redemption to the merchant ; and such an engagement will not be obligatory upon the merchant, but he will still have the right to take his goods upon payment of the money for which they may have been engaged (r).

(o) See *Hunter v. Prinsep and Others*, 10 East, 378, post. chap. 8 of this part ; *Van Omeron v. Dowick and Others*, 3 Campb. 42 ; *Joseph and Others v. Knox*, 3 Campb. 320. See also part I, chap. 1, sect. 2, ante, p. 12—13, and the several cases of *Reid v. Darby* ; *The Fanny and Elmira*, *Hayman and Others v. Moulton and Others*, and *Andrews v.*

Glover there cited.

(p) *Proprie pignus dicimus, quod ad creditorem transit; hypothecam, cum non transit, nec possessio ad creditorem*, Dig. 13, 7, 9, 2.

(q) Ante, part 2, chap. 3, sect. 13, p. 133.

(r) *Johnson v. Greaves*, 2 Taunt. 344.

11. It is obvious that this purpose, *viz.* the conveyance of the goods to the place of destination, cannot possibly be effected by a sale of the whole of them, and therefore, according to the principles before mentioned, the master cannot, in his character of master, have authority to make such a sale; nor does the law superadd such authority to his character (*s*). What, then, is the master to do, if by any disaster happening in the course of his voyage, he is unable to carry the goods to the place of destination, or to deliver them there? To this, as a general question, I apprehend no answer can be given. Every case must depend upon its own peculiar circumstances. The conduct proper to be adopted with respect to perishable goods, will be improper with respect to a cargo not perishable: one thing may be fit to be done with fish or fruit, and another with timber or iron: one method may be proper in distant regions, another in the vicinity of the merchant: one in a frequented navigation, another on unfrequented shores. The wreck of the ship is not necessarily followed by an impossibility of sending forward the goods; and does not of itself make their sale a measure of necessity or expedience: much less can the loss of the season, or of the proper course of the voyage, have this effect (*s*). An unexpected interdiction of commerce, or a sudden war, may defeat the adventure, and oblige the ship to stop in her course; but neither of these events doth of itself alone make it necessary to sell the cargo at the place to which it may be proper for the ship to resort. In these and many other cases, the master may be discharged of his obligation to deliver the cargo at the place of destination, but it does not therefore follow that he is authorized to sell it, or ought to do so. What, then, is he to do? In general, it may be said he is to do that which a wise and prudent man will think most conducive to the benefit of all concerned (*t*).

In so doing, he may expect to be safe, because the merchant will not have reason to be dissatisfied; but what this thing will be

(*s*) *Van Omeron v. Dowick and Others*, 2 Campb. 42.

(*t*) See the judgment of the Court of Common Pleas, delivered by Ch. J. Mansfield in *Christy v. Row*, 1 Taunt. 313. The Court appear to have thought that a master bringing back goods under

such circumstances, might be entitled to a compensation from the proprietor of the goods, although they held he could not recover any thing against a charterer of his ship who was not the proprietor of the goods, the service not being for his benefit.

no general rules can teach (*u*). Some regard may be allowed to the interest of the ship and of its owners, but the interest of the cargo must not be sacrificed to it. Transhipment, for the place of destination, if it be practicable, is the first object, because that is in furtherance of the original purpose; if that be impracticable, return, or a safe deposit (*v*) may be expedient. The merchant should be consulted, if possible (*w*). A sale is the last thing that the master should think of, because it can only be justified by that necessity, which supersedes all human laws. If he sell without necessity, his owners, as well as himself, will be answerable to the merchant (*x*), and they will be answerable if he places the goods at the disposal of a Vice Admiralty court, in a *British* colony, and they are sold under an order of the court, such a court having no authority to order a sale (*y*). And the persons who buy under such circumstances will not acquire a title as against the merchant, but must answer to him for the value of the goods (*z*).

"It is clear," said Lord *Denman*, delivering the judgment of the Court of Queen's Bench, in the recent case of *Shipton v. Thornton* (*a*), "that by the contract, the shipowner, and the master, as his agent, is bound to carry the goods to their destination in his own ship, if not prevented from doing so by some event which he has not occasioned, and over which he has no control. When, however, such an event has occurred to interrupt the voyage as above defined, and the shipowner or master (for we think no distinction can be made between the two) has no opportunity of consulting the freighter, there seems to be much disagreement in foreign ordinances and jurists on the point, whether or not he is *bound* to tranship, or having contracted only to carry in his own ship, he is not absolved from fur-

(*u*) I have not found any general rule or principle laid down on this subject in any of the foreign ordinances or authors. The French Ordin. tit. du Fret. art. 6, is as follows:—"S'il arrive interdiction de commerce avec le pays, pour le quel le vaisseau est en route, et qu'il soit obligé de revenir avec son chargement, il ne sera du au maitre que le fret de l'aller, quand même le navire auroit été affrété allant et venant." And Code de Commerce, art. 299.

(*v*) See an instance of deposit, which seems not to have been questioned, in

Liddard v. Lopes and Another, 10 East, 526, post, chap. 8.

(*w*) See *Wilson v. Millar and Others*, 2 Stark. 1.

(*x*) *Freeman and Another v. East India Company*, 5 B. & A. 617, and *Wilson v. Dickson*, 2 B. & A. 2.

(*y*) *Cannan and Others v. Meaburn and Others*, 1 Bing. 243, and 8 B. Moo. 127.

(*z*) *Morris and Another v. Robinson*, 3 B. & C. 196.

(*a*) 1 Perry & Davison, 216. See the facts of that case, post. c. 8.

ther prosecution of the enterprise, by the *vis major*, which prevents his accomplishing it in the literal terms of his undertaking. By the Rhodian law, the laws of Oleron, Art. 4, and the ordinances of Wisbuy, Art. 16, the master was at liberty, but was not bound, to tranship. The old French ordinance, on the other hand, in precise terms imposed the obligation upon him: "En cas que le vaisseau ne puisse être raccommodé, le maitre sera obligé d'en louer incessamment un autre." Art. 11, tit *Du Fret*. (a). The terms of this ordinance occasioned, however, much controversy, *Pothier* and *Valin* maintaining they were not imperative, except as the condition of earning full freight; *Emerigon*, on the other hand, insisting that the duty was strictly cast upon the master *as the agent of the freighters* (b). The modern French code appears to adopt this view of the question. The words of the Code de Commerce, s. 296, are, on this point, almost the same as those we have cited from the ordinance: and it is stated by Chancellor *Kent*, who, in his Commentaries, vol 3, p. 207-12, 3d ed. very ably and learnedly sums up the whole question, that *Boulay Paty* and *Pardessus*, in their commentaries on it, have agreed in holding to the construction adopted by *Emerigon*."

"All authorities, however, are in unison to this extent, that the master is *at liberty* to procure another ship to transport the cargo to the place of destination; and in these words Lord *Tenterden* cautiously lays down the rule of our law. It may, therefore, safely be taken to be either the duty or the right of the ship-owner to tranship, in the case above supposed: if it be the former, it must be so in virtue of his original contract; and it should seem to result from a performance by him of that contract that he will be entitled to the full consideration for which it was entered into, without respect to the particular circumstances attending its fulfilment: on the other hand, if it be the latter, a right to the full freight seems to be implied—the master is *at liberty* to tranship; but for what purpose, except for that of earning his full freight at the rate agreed on? In the case supposed, we may introduce another circumstance: Let the owner of the goods arrive, and insist, as he undoubtedly may, that the

(a) *Pothier*, vol 11, *Traité des Contrats de Louage Maritime*, part 1—3, s. 68; *Valin*, art. 11, tit. *Du Fret*. 1, p. 618.

(b) *Traité des Assurances*, vol. 1, chap. 12—16.

goods shall not proceed, but be delivered to him at the immediate port; there is no question but that the whole freight at the original rate must be paid, and that, because the freighter prevents the master, who is able and willing, and has the right to insist on it, from fulfilling the contract on his part, and because the sending the goods to their destination in another vessel is deemed a fulfilment of the contract. If, therefore, the owner of the goods be not present and personally exercises no option, still the shipowner, in forwarding the goods, must have the same rights, and in so doing must be taken to exercise them with the same object in view."

"One question, however, has been asked, which it will not be right to pass over: what, it has been said, if the transhipment can only be effected at a higher than the original rate of freight, which party is to stand to that loss? By the French ordinance and the Code de Commerce, (to which Chancellor *Kent* refers), the shipowner is entitled to charge the cargo with the increased freight; and, as a consequence of that rule it becomes an average loss; and in case of an insurance must be made good by the insurers (c). No case of the sort, that we are aware of, has occurred in this country, nor is it necessary for us to express any opinion further than as bears on the present question."

"It may well be, that the master's right to tranship may be limited to those cases in which the voyage may be completed on its original terms as to freight, so as to occasion no further charge to the freighters; and that, where freight cannot be procured at that rate, another, but familiar principle, will be introduced—that of agency for the merchant. For it never must be forgotten that the master acts in a double capacity; he is agent of the owner as to the ship and freight, and agent of the merchant as to the goods; these interests may sometimes conflict with each other; and from that circumstance may have arisen the difficulty of defining the master's duty, under all circumstances, in any but very general terms. The case now put supposes an inability to complete the contract on its original terms in another bottom, and therefore the owners' *right* to tranship will be at an end, but still, all circumstances considered, it may be greatly for the benefit of the freighter that the goods should be forwarded to their destination, even at an

(c) Emerigon, *Traité des Assur.* c. 12, s. 16; Code de Commerce, 350.

increased rate of freight; and if so, it will be the duty of the master, as his agent, to do so: *in such a case* the owner will be bound by the act of his agent, and of course be liable for the increased freight. The rule will be the same, whether the transshipment be made by the shipowner or the master; and, in applying it, circumstances make it necessary, on the one hand, to repose a large discretion in the master or owner, while the same circumstances require that the exercise of that large discretion should be very narrowly watched."

12. Moreover, the master must, during the voyage, take all possible care of the cargo (*d*). If it require to be aired or ventilated, as fruit and some other things do, he must take the usual and proper methods for this purpose (*e*); and although he is not responsible for injury done to it in consequence of a leak in the ship occasioned by tempest or other accident; yet where rats occasioned a leak in the vessel, whereby the goods were spoiled, the master was held responsible for the damage, notwithstanding the crew afterwards, by pumping, &c. did all they could to preserve the cargo from injury (*f*). And this determination agrees with the rule laid down by *Roccus*, who says, if mice eat the cargo, and thereby occasion no small injury to the merchant, the master must make good the loss, because he is guilty of a fault. Yet if he had cats on board his ship, he shall be excused (*g*). This rule and the exception to it, although bearing somewhat of a ludicrous air, furnish a good illustration of the general principle, by which the master and owners are held responsible for every injury, that might have been prevented by human foresight or care. In conformity to which principle they are responsible for goods stolen or embezzled on board the ship by the crew or other persons (*h*), or lost or injured in consequence of the ship sailing in fair weather against a rock or shallow known to expert mariners (*i*).

So where in a voyage from *Hull* to *Gainsborough* a vessel was sunk in the river *Trent* by striking against the anchor of another,

(*d*) Emerigon, tom. 1, p. 377.

(*e*) See Davidson v. Gywnne, 12 East, 381.

(*f*) Dale v. Hall, 1 Wils. 281.

(*g*) Roccus, not. 58, and see Jones on Bailments, p. 105. This rule is laid down in the Consolato del Mare, cap. 65

and 66, and adopted by all foreign writers on this subject. Emerigon, tom. 1, p. 377, 378.

(*h*) Roccus, not. 40; Wellwood, tit. 9, p. 30.

(*i*) Emerigon, tom. i. p. 373; Roccus, not. 55.

which anchor lay under water, and without a buoy, whereby some goods in the former were injured, the owners thereof were held responsible for the injury (*j*).

13. If the master, being compelled to take refuge in a foreign port during the course of his voyage, has occasion for money for the repairs of the ship, or other expense necessary to enable him to prosecute and complete the voyage, and cannot otherwise obtain it, he may, as hath been before observed, either hypothecate the whole cargo or sell a part of it for this purpose (*k*); in the latter case, if the ship reach the place of destination, the merchant will be entitled to receive the clear value, for which the goods might have been sold at that place (*l*); or he may take the sum for which the goods actually sold, and if he is content to do so, he may deduct that sum from the money payable for the freight of his other goods: and this, although the owner may have assigned the freight to a third person, and the goods were sold without an urgent necessity (*m*). If the ship afterwards perish, and reach not the destined port, the Ordinance of *Wisbuy* expressly declares that the money raised by this sale shall be paid to the merchant by the master (*n*); and *Cleirac*, *Kurick*, *Valin*, and *Pothier*, agree in opinion that the money is in such a case due not only from the master, but also from the owners, because it was expended for a purpose, of which they were at all events liable to sustain the charge. But none of the other Ordinances contain such a provision; and *Emerigon* contends, on the authority of the *Consolato del Mare*, and of the Ordinances of *Oleron* and *Antwerp*, that the money is only payable in case of the safe arrival of the ship; which was the opinion also of several persons whom *Pothier* consulted. And this doctrine seems the most reasonable, as the merchant is not thereby placed in a worse situation than if

(*j*) *Proprietors of the Trent and Mersey Navigation v. Wood*, East. Term, 1785, in K. B.

(*k*) *The Gratitude*, Mazzola, 3 Robs. Ad. Rep. 240, cited ante, part 2, chap. 3, sect. 21, p. 143.

(*l*) *Alers and Others v. Tobin and Others*, at Guildhall, October, 30, 1802, before Lord Ellenborough, Ch. J., and a special jury; *Laws of Oleron*, art. 22; *Ordin. of Wisbuy*, art. 35, 45, 69; *French Ordin.* liv. 2, tit. 1, *Du Capitaine*,

art. 19, liv. 3, tit. 3; *Fret*, art. 14, and *Valin* thereon; *Pothier*, *Charter-partie*, num. 33, 34; see also *Molloy*, book 2, chap. 2, sect. 14; and *Ordin. of Rotterdam*, art. 133, 134, 135; 2 *Magens*, 102, 103.

(*m*) *Campbell v. Thompson*, 1 Stark. 490.

(*n*) Art. 68. See *Emerigon*, tom. 2, p. 445, where the several authorities here referred to are cited.

his goods had not been sold, but had remained on board the ship. I cannot find that the question ever arose in this country. By the Code de Commerce, the master is to account for the price received, deducting the freight. Art. 298.

14. Lastly.—As to the completion of the voyage.

When the ship has arrived at the place of her destination, the master must take care that she be safely moored or anchored, and report his ship and crew, and deliver his manifest and other papers according to the law and custom of the place.

§ By the 3 & 4 Wm. 4, c. 52, it is enacted, “ That no goods shall be unladen from any ship arriving from ports beyond the seas, at any port or place in the *United Kingdom*, or the *Isle of Man*, nor shall bulk be broken after the arrival of such ship within four leagues of the coast, before due *report* of such ship, and due *entry* of such goods shall have been made and *warrant* granted in manner thereafter directed; that no goods shall be unladen, except at such times and places, and in such manner, and by such persons, and under the care of such officers as is thereafter directed, and that all goods not duly reported, or which shall be unladen contrary thereto, shall be forfeited; and if bulk be broken contrary thereto, the master of such ship shall forfeit 100*l.*, and if any alteration in the stowage be made to facilitate the unloading, or any part of the cargo be staved or destroyed, or any package opened within four leagues of the coast, the ship shall be deemed to have broken bulk (o).

That no goods shall be imported from parts beyond the seas in any *British* ship, nor any tobacco in any ship, unless the master shall have on board a *manifest* of such goods or of such tobacco, made out and dated, and signed by him, at the place where the same or the different parts of the same were taken on board, and every such *manifest* shall set forth the name and the tonnage of the ship, the name of the master and of the place to which the ship belongs, and of the place or places for which they are destined respectively, and shall contain a particular account and description of all the packages on board, with the marks and numbers thereon, and the sorts of goods, and the different kinds of each sort contained therein to the best of the master's knowledge, and of the particulars of such goods as are stowed loose,

and the names of the respective shippers and consignees, as far as the same can be known to the master; and to such particular account shall be subjoined a general account or recapitulation of the total number of the packages of each sort, describing the same by their usual names, or by such descriptions as the same can best be known by, and the different goods therein, and also the total quantity of the different goods stowed loose (*p*).

That before any ship shall be cleared out or depart from any place in any of the *British* possessions abroad, or from any place in *China*, with any goods for the *United Kingdom*, or the *Isle of Man*, the master of such ship shall produce the *manifest* to the collector or controllor of the customs, or other proper officer, who shall certify upon the same, the date of the production thereof to him (*q*).

That if any goods shall be imported into the *United Kingdom* or into the *Isle of Man* without such *manifest*, or if any goods contained in such *manifest* be not on board, the master shall forfeit 100%, and if he refuse to produce such *manifest*, and deliver a copy thereof to any officer of the customs, who within four leagues of the coast, shall demand the same, he shall also forfeit 100% (*r*).

That the master of every ship arriving from any such ports beyond the seas, shall within twenty-four hours of such arrival, and before bulk broken, make due *report* of such ship, and make and subscribe a declaration of the truth of the same before the collector or controllor of such port, and such *report* shall contain an account of the particular marks, numbers, and contents of all the different packages or parcels of goods on board such ship, and the particulars of such goods as are stowed loose to the best of his knowledge, and of the place and places where such goods were respectively taken on board, and of the burthen of such ship, and of the country where such ship was built, or 'if *British*, of the port of registry, and of the country of the people to whom such ship belongs, and of the name and country of the person who was master during the voyage, and of the number of the people by whom such ship was navigated, stating how many are subjects of the country to which such ship belongs, and how many are of some other country, and in such *report*, it shall be further de-

(*p*) Sect. 3.
(*q*) Sect. 4.

(*r*) Sects. 6 and 7.

clared, whether, and in what cases such ship has broken bulk in the course of her voyage, and what part of the cargo, if any is intended for importation at another part in the *United Kingdom*, and what part, if any, is prohibited to be imported, except to be warehoused for exportation only, and what part, if any, is intended for exportation in such ship, to ports beyond the seas, and what surplus stores or stock remain on board such ship, and if a *British* ship, what foreign made sails or cordage, not being standing or running rigging, are in use on board such ship, and the master of any ship who shall fail to make such report, shall forfeit the sum of 100*l.* (s).

That the master of every ship shall, at the time of making such report, deliver to the collector or controller the *manifest* of the cargo of such ship, where a *manifest* is required, and if required by the collector or controller, shall produce to him any bill or bills of lading, or a true copy thereof, for any and every part of the cargo laden on board, and shall answer all such questions relating to the ship and cargo, and crew, and voyage, as shall be put to him by such collector or controller; and in case of failure or refusal to produce such *manifest*, or to answer such questions, or to answer them truly, or to produce such bill of lading or copy, or if such *manifest* or bill of lading, or copy shall be false, or if any bill of lading be uttered by any master, and the goods expressed therein, shall not have been *bond fide* shipped on board such ship, or if any bill of lading uttered or produced by any master shall not have been signed by him, or any such copy shall not have been received or made by him, previously to his leaving the place where the goods expressed in such bill of lading, or copy were shipped, such master shall forfeit the sum of 100*l.* (t).

That every ship shall come as quickly up to the proper place of mooring or unloading as the nature of the port will admit, and without touching at any other place; and in proceeding to such place, shall bring to, at stations appointed by the Commissioners of his Majesty's Customs, for the boarding of ships by the officers of the Customs; and after arrival at such place of mooring or unloading, such ship shall not remove from such place, except directly to some other proper place, and with the knowledge of the proper officer of the Customs, on penalty of 100*l.*, to be paid by the master of such ship (u).

 (s) Sect. 8.

(t) Sect. 11.

(u) Sect. 13.

15. The master must also, without delay, deliver the cargo to the merchant or his consignees, upon production of the bills of lading and payment of the freight, and other charges due in respect of it; and he has no right to detain the goods for wharfage if the consignee tenders the freight, and requires them to be delivered over the ship's side; § and this although a sort of usage was proved that when goods are put over the ship's side, after she is moored, half wharfage was due in respect of them, which was contended to be a reasonable charge, as the goods derive a benefit from the ship being moored at the wharf, although not actually loaded there. "If the goods," said Chief Justice *Mansfield*, "are not landed, a compensation must be made for the benefit derived from the wharf by the owner of the ship. The goods cannot be subjected to this charge more than to many others, which are incurred by the ship in the course of her voyage (*u*). And if the consignee require to have the goods delivered to himself, and direct the master not to land them on a wharf at *London*, the master must obey the request; for the wharfinger has no legal right to insist upon the goods being landed at his wharf, although the vessel be moored against it (*v*). §

If, by the terms of the charter-party, a particular number of days is stipulated for the delivery, either generally or by way of demurrage, the master must wait the appointed time for that purpose, reckoning the days from the time of the ship's arrival at the *usual place of discharge* in the port, and not at the port merely (*w*). These charges are in ordinary cases *primage*, and the usual petty average, as expressed in the bill of lading; in case of any loss, that became the subject of general average, the civil law imposed upon the master the duty of adjusting and settling such average, and obtaining from the owners of the cargo saved the sums to be paid as a contribution to the loss, and allowed him to detain the cargo for that purpose (*x*). This power of detaining the cargo is also given by the laws of *Oleron* (*y*), and by the *French* ordinance (*z*). It is said to be the practice in this country, in the case of a general ship, for the master to take security from the merchants before

(*u*) *Bishop v. Ware*, 3 Campb. 360.

(*v*) *Syeds v. Hay*, 4 Term Rep. 260;
Stephen v. Costa, 1 Bl. Rep. 413, 423.

(*w*) *Brereton v. Chapman*, 7 Bing. 559.

(*x*) Dig. 14, 2, 2.

(*y*) Art. 9.

(*z*) Liv. 3, tit. 8, Du Jct. art. 21.

he delivers the goods, for payment of their shares of this contribution when the average shall be adjusted (*a*).

If goods are conveyed in pursuance of a charter-party, the right of detention for the freight may depend upon the terms of the particular contract (*b*): where there is no special contract, as in the case of a general ship, the master is not bound absolutely to part with the possession of any part of his cargo, until the freight and other charges, due in respect of such part, are paid. *Valin* informs us, that the entire contents of a single bill of lading are to be considered as one part, although consisting of very different articles, but that the contents of one bill of lading are not bound to the payment due for the contents of another bill of lading, although consigned to the same person (*c*). In this country, however, it has been held, that the master may detain any part of the merchandize for the freight of all that is consigned to the same person (*d*), which seems to be a more reasonable and convenient rule. The master, however, cannot detain the goods on board the ship, until these payments are made, as the merchant would then have no opportunity of examining their condition. By the ordinance of *Wisbuy* (*e*), and also by the *French* ordinance (*f*), the master may seize and detain the goods in the lighters or barges, which are to transport them to the quay, and by the former he may detain the lighters by the ship's side. *Cleirac* (*g*), in his commentary on the laws of *Oleron*, says that the same power is given by the ordinance of *Philip the Second*, and by the *Consolato del Mare*, and that the latter allows him to detain goods equal in value to four times the amount of the freight. The ordinance of *Rotterdam* allows the master to detain the goods for his freight, but requires him to unload and take care of them, that they may not be diminished or spoiled (*h*). In *England*, the practice is to send such goods as are not required to be landed at any particular dock to a public wharf, and order

(*a*) So deposed by a gentleman very conversant with this business, in the cause of *Myer and Others v. Vander Deyl*, Guildhall Sit. p. Mich. Term, 1803, before Lord Ellenborough, Ch. J. See the form in the Appendix.

(*b*) See before, p. 217, 220.

(*c*) *Valin* on the French Ordinance, tom. 1, p. 668.

(*d*) *Soldergreen v. Flight and Another*, Guildhall Sit. p. Trin. Term, 1796, before Lord Kenyon, Ch. J., quoted 6 East, 622.

(*e*) Art. 57.

(*f*) Liv. 3, tit. 3; Fret. art. 23.

(*g*) Art. 21, note 3, p. 72.

(*h*) Art. 157, 158, 2 Magens, 106.

the wharfinger not to part with them till the freight and other charges are paid, if the master is doubtful of the payment. And by the law of *England*, if the master once parts with the possession out of the hands of himself and his agents, he loses his lien or hold upon the goods, and cannot afterwards reclaim them (i). If the master land his goods at any particular wharf or dock, in obedience to an Act of Parliament, he does not thereby part with his lien (j). If goods are landed or sold by the officers of the Customs, the freight not having been paid, the produce of the sale is to be first applied to the payment of the freight (k).

The baggage of a passenger may be detained for the passage money, which is to be considered as payable in respect of the person and his baggage; but the passenger himself cannot be detained, nor the clothes taken from his person (l). The master has no right to detain goods actually brought for the payment of what is usually called dead freight, as I have before observed (m).

16. The manner of delivering the goods, and consequently the period at which the responsibility of the master and owners will cease, depend upon the custom of particular places, and the usage of particular trades (n). Thus, it is said, a hoyman, who brings goods from an out-port into the port of *London*, is not discharged by landing them at the usual wharf, but is bound to take care and send them out by land to the place of consignment (o).

§ With respect to goods coming from a foreign country, it was said by Mr. Justice *Buller*, that the bill of lading was only an undertaking to carry from port to port, and that, according to the established course of trade, a delivery on the usual wharf is such a delivery as will discharge the master (p). The master should,

(i) By the French Ordin. liv. 3, tit. 3, Fret, art. 24. The lien or privilege continues while the goods are on board the ship, in the lighters, or on the quay, and even for a fortnight after they have been delivered, provided they have not in the meantime passed into the hands of a third person, so by the Code de Com. art. 307.

(j) *Wilson and Others v. Kymer and Others*, 1 M. & S. 157. The goods in this case were landed under the West India Dock Act, 39 Geo. 3, c. 69, which does not expressly reserve the lien for

freight, as is done by the London Dock Act, 45 Geo. 3, c. 58, s. 15.

(k) 6 Geo. 4, c. 107, s. 134.

(l) *Wolf v. Summers*, before Lawrence, J., at Guildhall, 2 Campb. 631.

(m) See before chap. 1 of this part, sect. 7, p. 217.

(n) See Valin on the French Ordinance, tom. 1, p. 530.

(o) *Wardell v. Mourillyan*, 2 Esp. N. P. C. 693.

(p) *Arguendo in the case of Hyde v. Trent and Mersey Navigation Company*, 6 Term Rep. 397.

however, recollect, that his engagement is to deliver the goods to the persons mentioned in the bill of lading or their assigns; and where, to an action for not delivering goods shipped on board a steam-packet at *Dublin*, to the plaintiff or his assigns at the port of *London*, pursuant to the bill of lading, the defendant pleaded, 1. That he safely landed and deposited the goods in and upon a certain wharf, called *Fenning's* wharf, at the said port of *London*, there to remain until the same could be delivered to the plaintiff or his assigns,—the said wharf being at a place at which goods conveyed in steam vessels from the port of *Dublin* to the port of *London* were on their arrival used and accustomed to be landed and deposited, for the use of the consignees thereof, and a place fit and proper for the purpose; and that the goods were there destroyed by an accidental fire, without alleging such delivery to have been made, according to the custom or practice of the port of *London*, or that a reasonable time was allowed to elapse after the ship's arrival at the port of *London*, in order to give time to the consignee to claim and receive his goods alongside the vessel,—it was held ill. “The defendants,” said Chief Justice *Tindal*, “profess in their plea to substitute a delivery at *Fenning's* wharf, in the port of *London*, for and in the place of a delivery ‘at the port of *London*, to the plaintiff or his assigns,’ as required by the terms of the bill of lading. But we know of no general rule of law which governs the delivery of goods under a bill of lading, where such delivery is not expressly in accordance with the terms of the bill of lading, except that it must be a delivery, according to the practice and custom usually observed in the port or place of delivery. An issue raised upon an allegation of such a mode of delivery would accommodate itself to the facts of each particular case, and would let in every species of excuse from the strict and literal compliance with the precise terms of the bill of lading, which must be necessarily allowed to prevail, with reference to the means and accommodation for landing goods at different places, the time of the arrival and departure of the vessel, the state of the tide and wind, interruptions from accidental causes, and all the other circumstances which belong to each particular port or place of delivery (q). §

If the consignee send a lighter to fetch the goods, it seems the

(q) *Gatcliffe v. Bourne*, 4 Bing. N. C. 314.

master of the ship is obliged, by the custom of the river *Thames*, to watch them in the lighter, until the lighter is fully laden; and he cannot discharge himself from this obligation by declaring to the lighterman that he has not hands to guard the lighter, unless the consignee consent to release him from the performance of it (*r*). But it has been much contested whether the master is by the usage bound to take care of the lighter, after it is fully laden, until the time when it can be properly removed from the ship to the wharf. At a trial on this question, it was held that the master was not obliged to do this (*s*). When ships arrive from *Turkey*, and are obliged to perform quarantine (*t*) before their entry into the port of *London*, it is usual for the consignee to send down persons, at his own expense, to pack and take care of the goods; and therefore, where a consignee had omitted to do so, and goods were damaged by being sent loose to shore, it was held that he had no right to call upon the master of the ship for a compensation (*u*).

16. § On the arrival of the vessel at her homeward port, and when compelled by accidents or injury to put back, or into a port other than that of her destination, it is usual for the master to present himself before a notary, and cause a *protest* to be noted, and afterwards drawn up or *extended* (*v*). British consuls at foreign ports are empowered by statute to perform notarial acts (*w*); but inasmuch as their attestation would probably not be deemed abroad of equal authenticity with that of the regular public notary, the master would do well to address himself to that functionary.

The protest is a declaration or narrative by the master, of the particulars of the voyage, of the storms or bad weather which the vessel may have encountered, the accidents which may have occurred, and the conduct which, in cases of emergency, he had thought proper to pursue. With whatever formalities drawn up, it cannot be received in our courts as evidence for the master or

(*r*) *Catley and Another v. Wintringham*, Peak, N. P. C. 150.

(*s*) *Robinson v. Turpin and Another*, Guildhall Sit. after Trin. Term, 1805, before Lord Ellenborough, Ch. J. This was an action by the owner of the goods against the lighterman, and the plaintiff obtained a verdict. At a former trial before Sir James Mansfield, Ch. J., the plaintiff had been nonsuited. And see

Strong v. Natally, 4 Bos. & Pull. 16.

(*t*) As to Quarantine, see stat. 6 Geo. 4, c. 78, and see *Macculloch's Dictionary of Commerce*.

(*u*) *Dunnage v. Joliffe*, before Lord Kenyon, Ch. J., at Guildhall Sit. p. Mich. Term, 1789.

(*v*) *Brooke's Office and Practice of a Notary*, p. 144.

(*w*) 5 & 6 Wm. 4, c. 62, s. 15.

his owners (*x*); but it may be evidence against him and them, and he should take care to supply from the log-book, his own recollection, and that of the mate, or trust-worthy mariners, true and faithful instructions for its preparation. Protests are, often of great utility in matters connected with the adjustment of losses in marine insurance and in the calculation of averages; they are received as evidence in foreign courts, and with us credit is often given to their contents by merchants and underwriters, when free from all circumstances of suspicion (*y*).

Protests are also made by the master against the charterers of the ship or the consignees of goods for not loading or unloading the vessel pursuant to contract, or within reasonable or stipulated delays; and by the merchant against the master for misconduct, drunkenness, &c., for not proceeding to sea with due despatch, for not signing bills of lading in the customary form, and other irregularities.

Forms of protest applicable to ordinary occasions will be found in the Appendix. §

(*x*) *Senat v. Porter*, 7 Term Rep. 158, and *Rex v. Scriveners' Company*, 10 B. & C. 511. See the *Betsey Caines*, Wilson, 2 Hag. Ad. Rep. 28.

(*y*) *Brooke's Office and Practice of Notary*, p. 9, and see 5 and 6 Wm. 4, c. 62, s. 15.

CHAPTER V.

OF THE CAUSES WHICH EXCUSE THE MASTER AND OWNERS.

1. IT has been already intimated (a) that a carrier is in general excused for a non-performance of the contract on his part, occasioned by any event falling within the meaning of the expression *Act of God and the King's enemies*. The expression *Act of God* denotes natural accidents, such as lightning, earthquake, and tempest; and not accidents arising from the negligence of man (b); for which it has been already shewn that the master and owners, like other common carriers, are sometimes answerable, although no actual blame may be imputable to them; for in considering whether they, or other carriers, are chargeable for any particular loss, the question is, not whether the loss happened by reason of the negligence of the persons employed in the conveyance of the goods, but whether it was occasioned by any of those causes which, either according to the general rules of law, or the particular contract of the parties, afford an excuse for the non-performance of the contract.

Thus, the master has been held answerable for a loss of the goods occasioned by a seizure of the ship by the officers of the revenue, for a supposed violation of the revenue laws, although in the result of the proceedings under the seizure, it may appear that there was no cause for condemnation (c). So, probably, the master and owners would, by the common law, be answerable for a loss arising from the negligence or misconduct of a local pilot, to whom the direction of the ship was necessarily entrusted (d), but

(a) In the preceding chapter, sect. 2, p. 297.

In the preamble to the stat. 26, Geo. 3, c. 86, the cases in which the master and owners are exempted from responsibility, are expressed to be *accidents by the King's enemies, the perils of the sea, or the act of God*.

(b) *Trent and Mersey Navigation Company v. Wood*, East. Term, 23 Geo. 3, in K. B.; *Forward v. Pittard*, 1 Term Rep. K. B. 27.

(c) *Gosling v. Higgins*, 1 Campb. 451.

(d) See the opinion of the Ch. Justice in *Bowcher v. Noidstrom*, 1 Taunt. 568.

this responsibility (in certain cases at least) is now taken away by an act of Parliament (e).

So in an action (f) brought against the master of a vessel navigating the river *Ouse* and *Humber* from *Selby* to *Hull*, by a person whose goods had been wet and spoiled; at the trial whereof it appeared in evidence, that at the entrance of the harbour at *Hull* there was a bank, on which vessels used to lie in safety, but of which a part had been swept away by a great flood some short time before the misfortune in question, so that it had become perfectly steep instead of shelving towards the river; that a few days after this flood, a vessel sunk by getting on this bank, and her mast, which was carried away, was suffered to float in the river tied to some part of the vessel: and that the defendant, upon sailing into the harbour, struck against the mast, which, not giving way, forced the defendant's vessel towards the bank, where she struck, and would have remained safe, had the bank been in its former situation, but on the tide ebbing, her stern sunk

(e) Stat. 6 Geo. 4, c. 125, s. 55, ante, p. 183.

(f) *Smith v. Shepherd*. This cause was first tried at the Summer Assizes for Yorkshire, 1795, and the plaintiff nonsuited, the Judge being of opinion that no case of negligence was proved. The nonsuit was set aside by the Court of King's Bench, and a new trial granted, that the facts might be more fully inquired into. It was tried a second time at the Lent Assizes following. The account in the text is of the evidence given at the second trial, which differed in some particulars from that given at the first trial. In Easter term following, a new trial was moved for, but a rule to shew cause refused.

Several shipowners, being greatly alarmed at the decision of this cause, petitioned Parliament for an alteration of the law on this subject; and a bill passed the House of Commons, enacting, that no owner or master of any ships or vessels, employed in the navigation of the high seas, should be subject to answer for any loss or damage which should happen to any goods on board by any accident whatever, unless the same should happen or arise "by or through the robbery, em-

bezzlement, secreting, or making away with, or by or through the actual default of the said owner or owners, master, mariners, or other person or persons employed in and on board of such ships or vessels; any law, usage, or custom to the contrary thereof in anywise notwithstanding." And that no owner or master of any ship or vessel employed in the navigation of the tideway of any river, and not employed in the navigation of the high seas, should be subject to answer for any loss or damage which should "happen or arise at or below any port or place in such tideway, where ships or vessels employed in the coasting trade, do or shall load or discharge by entry or sufferance;" to any goods on board, unless such loss or damage should happen or arise in the ways before-mentioned with respect to ships navigating the high seas.

But this bill was rejected by the House of Lords.

This led to the alteration of the bill of lading mentioned before, part 4, chap. 3, sect. 2, and I presume, also to the notice mentioned to have been given in the case of *Ellis v. Turner* and *Another*, part 2, chap. 2, sect. 3, p. 111.

into the water and the goods were spoiled; upon which the defendant tendered evidence to show that there had been no actual negligence: Mr. Justice *Heath*, before whom the cause was tried, rejected the evidence; and he further ruled that the act of God which could excuse the defendant, must be *immediate*; but this was too remote; and directed the jury to find their verdict for the plaintiff; and they accordingly did so. The case was afterwards submitted to the consideration of the Court of King's Bench, who approved of the direction given by the learned Judge at the trial, and the plaintiff succeeded in the cause. There does not appear to have existed in this case any bill of lading or other instrument of contract; and the question, therefore, depended upon general principles, and not upon the meaning of any particular words, or exception.

The only exception formerly made in the common bill of lading was of the *perils of the sea*, which words certainly denote the *natural* accidents peculiar to that element, and in more than one instance, have been held to extend to an event not attributable to natural causes. The several words lately introduced into the exception of the bill of lading (*g*) have hitherto furnished matter for one judicial determination only, which has been already noticed. In the present chapter, therefore, I shall first consider the meaning of this extensive phrase, *perils of the sea*, and then proceed to mention other excuses, which the wisdom of the legislature has introduced in very late times.

2. In considering this subject, the first question that presents itself to the mind of an *English* lawyer, is, how is the question of *peril of the sea* to be decided? The particular manner in which a loss happens, must always be a question of fact, but admitting it to have happened in a particular manner, is the judge, before whom the cause is tried to pronounce whether that manner be a peril of the sea, or are the jury to declare it by their verdict? In general, the construction of ambiguous expressions in written instruments is the proper province of the judge; but in mercantile instruments it often happens that the judge must have recourse to the usage of trade, and the practice among merchants, to obtain a proper knowledge of the meaning of the words. When the meaning of the words is ascertained, it will rarely happen that the

(*g*) See chap. 2 of this part, sect. 2, p. 280.

judge and jury can differ in the conclusion; and, probably, this question, although it might afford matter of speculation, will never become a subject of serious practical inquiry.

A very remarkable case to this purpose happened about the end of the reign of *Charles the First*. To an action of covenant on a charter-party, which contained an exception of the *perils of the sea*, the defendant pleaded that the ship was taken by hostile persons unknown, armed in a warlike manner; and thereupon the question whether such a capture were within the exception, was brought before the Court by a demurrer in the most strict technical form; the Court, however, took the opinion of several merchants by certificate in writing, and afterwards by examination in open court, upon the meaning of the words of this exception as established by usage among them, and decided in conformity to such opinion (*h*).

At the trial of a cause before Lord *Kenyon*, in an action upon the case brought by a merchant against the owner of a ship, for not safely conveying goods, where the whole matter was left open for discussion by a plea of the general issue, this question was proposed to be agitated by the counsel. His Lordship, however, without hesitation, declared his opinion to be, that the question was purely a matter of fact for the consideration of the jury; upon the particular circumstances of the case the jury and his Lordship coincided, and therefore the case afforded no opportunity of a more solemn discussion of the question (*i*).

These cases certainly furnish very strong authority to show, that even if the decision of this question does strictly and properly belong to the judge, yet his decision will be guided by usage and the course of practice among merchants, which are matters of evidence and of fact.

3. In the case of *Pickering v. Barclay*, which I have just before alluded to (*k*), the ship had been overpowered and plundered on the high seas by pirates, and the question was, whether the owners were answerable for the goods? and it was determined in the manner before-mentioned, that they were not answerable, "because," says the reporter, "the taking by pirates was accounted

(*h*) *Pickering v. Barclay*, 2 Roll. Ab. 248, and Style, 132. The case was argued by Twisden for the plaintiff, and Hale for the defendant.

(*i*) *Buller v. Fisher*, Sit. p. Mich. Term, 40 Geo. 3, at Guildhall.

(*k*) *Pickering v. Barclay*, ubi supra.

a peril of the sea." The same question received a similar decision not long afterwards in another cause (*l*). These determinations agree with the rule of the civil law (*m*): And in the case cited in the preceding chapter (*n*), in which the owners were held responsible for goods taken by robbery from the ship in the river *Thames* within the body of a county, Chief Justice *Hale* took notice of this doctrine, and said, "by the Civil Admiral law the owners are not responsible for "a robbery by pirates at sea." This, however, is to be understood only in case the ship does not fall into the hands of pirates by any negligence or fault of the master (*o*).

4. In a case, which came before the Court of King's Bench, a short time before the late alteration of the bill of lading, and which was an action brought to recover the value of goods, for which the master had signed a bill of lading containing an exception only of the *perils of the sea*, although made during the time of a war, and which goods were lost in consequence of the ship being designedly struck by the vessel of an enemy; it was doubted by the Court, whether a loss so occasioned, were within the meaning of this exception, and the cause never proceeded to a final judgment (*p*). The express exception in this case afforded room to contend, that the exception of the act of the King's enemies, which arises out of general rules of law, was meant to be excluded in the particular instance.

5. In the other cases just before mentioned (*q*), the ship in which the goods were conveyed, was run down in day light, and not in a tempest, by one of two other ships, that were sailing in an opposite direction to her, both of which kept to windward, as did also the defendant's ship, but it was matter of so much doubt, whether the master of the defendant's ship, ought to have understood the course which the others would pursue, and have borne to leeward to avoid them, that no blame was considered to be imputable to him for not having done so, nor was any fault attri-

(*l*) *Barton v. Wolliford*, Comb. 56.

(*m*) Dig. 4, 9, 3, 1. *Inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari.*

(*n*) *Morse v. Slue*, 1 Vent. 190, ante, chap. 4 of this part, sect. 3.

(*o*) *Emerigon*, tom. 1, p. 532.

(*p*) *Bever v. Tomlinson*, East. Term, 36 Geo. 3. The case came before the Court on a motion for a new trial; the Court directed a new trial in order that the facts might be put upon the record, but it never came on again.

(*q*) *Buller v. Fisher*, ante, p. 340.

butable to the persons, who had the conduct of either of the other ships. This loss was, therefore, held to fall within the meaning of this exception, and to have happened by a peril of the sea.

It may be proper to point out the distinction between this case and the case of the vessel, that struck against the anchor of another, to which there was no buoy; which I have mentioned in the preceding chapter (*r*). In this case there was no fault or negligence in the persons belonging to either vessel; in the other, both parties were held to have been guilty of negligence, the one in leaving his anchor without a buoy, the other in not avoiding it, as when he saw the vessel in the river, he must have known that there was an anchor near at hand; or if it be taken that negligence was imputable only to the master, who had left his anchor without a buoy, then he was answerable over to the master and owners of the vessel, whose cargo had been injured: and indeed the accident happened in the course of a navigation, to which the exception of the *perils of the sea* did not apply.

In a case upon a policy of insurance, wherein the loss happened by the circumstance of the master of a *British* ship mistaking the ship insured for an enemy, and under that mistake firing into her, whereby she was sunk, it was doubted whether the loss could properly be said to have happened by a peril of the sea, and the point was not decided, because the loss was held clearly to fall within some other of the words used in the policy, and the manner of the loss was expressly stated in one of the counts of the declaration (*s*). In another case, on a policy of insurance, wherein it appeared that the master of the ship insured mistaking a *British* ship of war for an enemy, produced simulated papers, and concealed his *British* licence, in consequence of which his ship was taken in tow by the ship of war, and in order to keep up, was obliged to use an extraordinary press of sail, and during a gale of wind and a high sea, shipped a quantity of water whereby the cargo was damaged; Lord *Ellenborough* held this to be a loss by perils of the sea (*t*). In another case arising also upon a policy of insurance, wherein the loss happened by collision without any neglect or fault on the part of the *Helena*, the ship insured, and was so specially alleged in the declaration, the

(*r*) Sect. 12, p. 327.

(*t*) *Hagedorn and Another v. Whit-*

(*s*) *Cullen v. Butler*, 1 Stark. 138, and more, 1 Stark. 157.

5 M. & S. 461.

underwriters were held answerable, and *Mansfield*, C. J., said, "I do not know how to make this out not to be a peril of the sea, what drove the *Margaret* against the *Helena*? the sea; what was the cause that the crew of the other ship did not prevent her from running against the *Helena*? their gross and culpable negligence; but still the sea did the mischief (u). It is reasonable enough that the plaintiffs should permit the defendant to use their names as plaintiffs against the owners, or crew of the *Margaret*, so as to recover whatever the plaintiffs would be entitled to as against the *Margaret*, and to apply it in diminution of their loss." In another case, wherein it appeared that a ship was hove down on a beach within the tide-way, for the purpose of repairing, and the tide having carried away the shoars by which she was supported, her side and some of her timbers were injured, the damage was considered as having happened on the land, and not to be a loss by perils of the sea (v). But where a ship was moored in a harbour, having a hard uneven bottom, and being left by the tide at night, a noise was heard as of timber breaking, and on the reflux of the tide, there being a considerable swell in the harbour, she struck the ground hard several times, and in the morning several of her knees were found to be broken, this damage was held to be a loss by peril of the sea (x).

6. But not every loss proceeding directly from natural causes, is to be considered as happening by a peril of the sea. It was decided by Lord *Kenyon*, that the destruction of a vessel by worms at sea, was not loss by perils of the sea (y). If a ship perish in consequence of striking against a rock or shallow, the circumstances, under which the event takes place, must be ascertained in order to decide, whether it happened by a peril of the sea or by the fault of the master. If the situation of the rock or shallow is generally known, and the ship not forced upon it by adverse winds or tempest, the loss is to be imputed to the fault of the master. On the other hand, if a ship is forced upon such a rock or shallow, by adverse winds or tempest, or if the shallow was occasioned by a sudden and recent collection of sand in a place, where ships could before sail in safety; the loss is to be attributed to the act of God or the perils of the sea (z). In the case mentioned

(u) *Smith and Others v. Scott*, 4 Taunt. 126.

(v) *Thomson v. Whitmore*, 3 Taunt. 227.

(x) *Fletcher v. Inglis*, 2 B. & A. 315.

(y) *Rohl v. Parr*, 1 Esp. 445.

(z) *Roccus*, not. 55; *Strac. de nautis*, pars. 3, num. 32.

in the beginning of this chapter (a) Lord *Kenyon* observed, that if an earthquake had removed the bank at the time of the accident, the master would have been excused.

7. If a vessel, reasonably sufficient for the voyage, be lost by a peril of the sea, the merchant cannot charge the owners by showing that a stouter ship would have outlived the peril. This was decided in the case of a hoy driven by a sudden gust of wind against the pier of a bridge, through which it attempted to pass, and thereby sunk, in consequence of a shock that a stronger vessel might have sustained without sinking (b).

8. From the preceding observations and authorities, it will be obvious that neither the master nor owners can be answerable for a loss happening to the cargo by *lightning*. Yet, upon the principle upon which the decisions are founded, they must be answerable for a loss by fire proceeding from any *other* cause, whether originally commencing in their own ship, or communicated to it from another. And in the case of an inland carrier (c), this point has been solemnly decided, and the law remains unaltered (d). But by a statute made in 'the very same year in which the point was first decided, it is enacted, "That no owner or owners of any ship or vessel shall be subject or liable to answer for, or make good, to any one or more person or persons, any loss or damage which may happen to any goods or merchandize whatsoever, which from and after the *first* day of *September*, 1786, shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of *any fire* happening to or on board the said ship or vessel (e).

In this clause the *master* is not mentioned; and therefore it may be doubtful whether his responsibility is in this case removed by the statute: but the insertion of the word *fire* in the modern bill of lading has certainly removed it.

9. By another section of the same statute, *reciting*, "That dis-

(a) *Smith v. Shephard*, ante, p. 338.

(b) *Amies v. Stevens*, 1 Stra. 128; Bull. N. P. p. 69.

(c) *Forward v. Pittard*, 1 Term Rep. K. B. p. 27.

(d) *Hyde and Another v. Trent and Mersey Navigation Company*, 5 Term Rep. K. B. p. 389. But a warehouseman is not answerable for a loss by fire.

Garside v. Trent and Mersey Navigation Company, 4 Term Rep. K. B. 581. Nor is the hirer of goods answerable, per Lord Kenyon, Ch. J., Sit. at Westminster, p. East. Term, 1790; *Longman v. Galini*, in the case of musical instruments hired to be used at the Opera House, and destroyed by fire there.

(e) 26 Geo. 3, c. 86, s. 2.

putes may arise, whether the owners or masters of ships are liable to answer or make good the value or amount of any gold, silver, diamonds, watches, jewels, or precious stones, which may be lost after the same have been put on board their ships on freight, without the shippers thereof declaring at the time the value of such goods,"—it is *enacted*, "That no *master*, owner, or owners, of any ship or vessel shall be subject or liable to answer for or make good, to any one or more person or persons, any loss or damage which may happen to any gold, silver, diamonds, watches, jewels, or precious stones, which from and after the passing of this act shall be shipped, taken in, or put on board any such ship or vessel, by reason or means of any robbery, embezzlement, making away with, or secreting thereof, unless the owner or shipper thereof shall, at the time of shipping the same, insert in his bill of lading, or otherwise declare in writing to the master, owner, or owners, of such ship or vessel, the true nature, quality, and value of such gold, silver, diamonds, watches, jewels, or precious stones" (*f*).

10. By the late act of Parliament, passed for the more effectual regulation of pilotage, it is provided, that no owner or master of any ship or vessel shall be answerable for any loss or damage, "for or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of such ship or vessel, under or in pursuance of any of the provisions of that act, where and so long as such pilot shall be duly qualified to have the charge of such ship, or where and so long as no duly qualified pilot shall have offered to take charge thereof" (*g*).

11. "*The Restraint of Princes and Rulers*," commonly mentioned in charter-parties as an exception or excuse for the non-performance of the contract on the part of the master, is to be understood of an actual, and not of an expected restraint, although the expectation may be reasonable and well-grounded, and the master may act upon it with fair and honest intentions. This was decided in the following case. The *British* ship *Adelphi* was chartered for a voyage from *London* to *Petersburgh*, or as near thereto as she could safely get, there to load a complete cargo of hemp, and of iron for ballast, and proceed therewith to *Woolwich* and *London*, and there deliver the same, on being paid

(*f*) Sect. 3.

(*g*) 6 Geo. 4, c. 125, s. 55, see also part, 2, c. 5, p. 158.

freight at certain rates per ton (restraint of princes and rulers during the said voyage always excepted): thirty running days to be allowed the merchant for loading. Under this contract the ship sailed to *Cronstadt* (the port of *Petersburgh*), and there took in iron for ballast and a certain quantity of hemp; and the master was proceeding with all due diligence to load his full cargo of hemp, by screwing it down in the usual way, when, about the ninth day, a rumour was circulated of an embargo being about to be laid by the *Russian* government on all *British* vessels, and the person who was agent for the *British* factory at *Cronstadt*, and agent also to the house at *Petersburgh*, who were the agents to the merchant-charterer of this ship, in consequence of instructions received from the *British* consul-general at *Petersburgh*, desired the captains of such *British* vessels as were ready to proceed to sea, to do so as soon as possible, as he expected an embargo might take place immediately. In consequence of this, the master gave orders to leave off screwing down hemp, and to fill the ship as fast as possible by hand; and the whole day was employed in this way, and the ship filled as far as could be done by hand. In the evening the ship sailed with something more than half the cargo that she could have carried, if the hemp had been screwed down: the merchant had a sufficient quantity of hemp for a full cargo lying by the ship's side in lighters. Many other *British* vessels sailed the same evening, or the next morning, without full cargoes: some, however, remained, and afterwards completed their lading, and were not detained by the *Russian* government. No embargo was, in fact, imposed until six weeks after this time: the ship would have completed her loading within that period. The master sailed away without any communication with the defendant's agents at *Petersburgh*, who came to *Cronstadt* as soon as they had notice of the circumstances, with intention to stop the ship, but arrived too late. The master acted *bonâ fide*, and as an honest man, and there was reasonable and well-grounded apprehension for his acting as he did. The goods taken on board were brought to *London*, and there delivered to the merchant. The merchant sued the master for not bringing a complete cargo, according to his contract. It was argued that the master was excused either by the operation of this clause in the contract, or by that general principle of law, which requires every subject, as a matter of public duty, to save the property and persons entrusted to his charge from falling into the hands of the enemies of his country.

But the court held, that neither of these grounds furnished an excuse in the particular circumstances of this case.

"It has been contended," said Lord *Ellenborough*, "that the exception contained in this contract, of 'restraint of princes and rulers during the voyage,' excuses the not taking on board a complete cargo in this case; but, without considering whether this provision respecting *restraint of princes*, &c. be at all applicable, by way of excuse, for the non-performance of this part of the master's stipulated duty, viz. the taking on board a complete cargo; yet, at any rate, the *restraint* meant must be an actual and operative restraint, and not a merely expected and contingent one, as this at most only was. But it has been further argued by the defendant's counsel, that supposing the master, in respect of his express contract, not to be otherwise justifiable in regard to the freighter, yet that he is so at any rate, on the ground of his paramount duty to the state, which required him to save the property and crew under his charge from the impending peril of an instantly expected embargo; and that, in every private contract, however express in its terms, there is always a reservation to be implied for the performance of a public duty, in which the interest of the state is materially involved. That no contract can properly be carried into effect which was originally made contrary to the provisions of law, or which, being made consistently with the rules of law at the time, has become illegal in virtue of some subsequent law, are propositions which admit of no doubt. Neither can it be questioned, that if, from a change in the political relations and circumstances of this country, with reference to any other contracts which were fairly and lawfully made at the time, they have become incapable of being any longer carried into effect without derogating from the clear, public duty which a *British* subject owes to his sovereign and the state, of which he is a member; the non-performance of a contract in a state so circumstanced is not only excusable, but a matter of peremptory duty,—an obligation on the part of the subject. But in order to found this new public duty, which is to supersede the performance of his former private one, it is necessary that an actual change in the political relations of the two countries should have taken place, and that the danger to result to the public interest of his own country from an observance of the contract, should be clear, immediate, and certain. In short, such a state of circumstances must be shown to exist, as that the contract is no longer capable of

being performed by him, without criminal compromise of his public duty. Can anything of this kind be said, with truth, to exist in the present case? No actual change in the political relations of *Great Britain* and *Russia* had then taken place. The danger to result from remaining at *Cronstadt* was neither immediate or certain; in point of fact, it attached only at the distance of many weeks afterwards; and no one can venture to suggest, even in argument, that the loading in question might not have been completed without any criminal compromise of public duty. Indeed, to allow a man to withdraw himself from the performance of a distinct positive contract, upon the ground of some speculative inconvenience, suggested as *likely* to result from such performance to the general interests of the state, would afford great encouragement to disingenuous subtleties, and refinements upon subjects of this kind, and would render all reliance upon the solemn stipulation of parties in commercial matters precarious and insecure; and which encouragement this court would most reluctantly lend its assistance, to administer. For the reasons already given, such an argument has no foundation to rest upon in the present case. Therefore, neither upon this ground any more than upon the others already considered, is the plaintiff precluded from a right to recover" (*h*).

(*h*) *Atkinson v. Ritchie*, 10 East, 530.

CHAPTER VI.

OF THE LIMITATION OF THE RESPONSIBILITY OF THE OWNERS AND MASTER.

1. IN considering the instances in which the owners are answerable to the merchant for the loss or damage of his goods, I have hitherto forbore to mention the limits of their responsibility, and have treated them as being responsible up to the full extent of the amount of such loss or damage; and so both by the civil law and by the common law of *England* they formerly were. For although it was decided (*a*) at a time, when the ransom* of ships taken by a foreign enemy was not contrary to the laws of the realm (*b*), that such ransom could not be made at a price exceeding the value of the ship and cargo (and the loss of the value of the cargo would fall upon the merchants), yet until the responsibility of the shipowner for the loss or damage of goods was limited by statute, it was never doubted but that such responsibility was co-extensive with the loss, and the statutes, which have been made to narrow it, are founded upon that supposition.

The ancient laws of *Oleron*, *Wisbuy*, and the *Hanse-Towns* contain no provision on this subject. Nor is any alteration of the rule of the civil law noticed by *Roccus* (*c*), although *Vinnius*, an earlier author, says, that by the law of *Holland* the owners are not chargeable beyond the value of the ship and things that are in it (*d*); in conformity to which principle the *French Ordinance* declares, "that the owners of ships shall be answerable for the acts of the master, but shall be discharged therefrom upon relinquishing their ship and the freight" (*e*). A similar provision is

(*a*) *Helley v. Grant, and Grahsm and Another v. Hall*, cited 1 Term Rep. K. R. 79.

(*b*) 22 Geo. 3, c. 25, prohibits ransom.

(*c*) The *Notabilia* of this author, who was a Neopolitan, were first published in 1655.

(*d*) In *Peckium*, p. 155, published in 1647, the author cites *Grotius*, lib. 3, In-

troduc. ad. Jurisp. Bat. c. 1, and lib. 2, de jure belli et pacis, c. 11, n. 13.

(*e*) *Liv.* 2, tit. 8, des propriétaires, art. 2. The encouragement of maritime commerce, especially among the noblesse, was one of the principal objects of this ordinance. See same book, and tit. art. 1, and *Valin's* Preface to that title. See also the *Code de Com.* art. 216.

contained in the Ordinance of *Rotterdam*, made in 1721, which declares, "That the owners shall not be answerable for any act of the master done without their order, any further than their part of the ship amounts to" (*f*): and by other articles of the same Ordinance it appears that each part owner is liable only for the value of his own share (*g*). *Valin*, in his commentary on the *French Ordinance* (*h*), informs us that the same regulations are also established at *Hamburgh* (*i*).

2. The earliest provision of the *British* legislature on this subject is a statute made a few years after the date of the Ordinance of *Rotterdam*, and which was passed in consequence of a petition presented to the House of Commons by several merchants and other persons owners of ships belonging to the port of *London* (*k*), setting forth the alarm of the petitioners at the event of a late action, in which it was determined that the owners were answerable for the valuable merchandize embezzled by the master. The foundation of this limitation is mentioned in the preamble of the statute: which states, "That it is of the greatest consequence and importance to this kingdom to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein: and that it has been held, that in many cases owners of ships or vessels are answerable for goods and merchandize shipped or put on board the same, although the said goods and merchandize, after the same have been so put on board, should be made away with by the masters or mariners of the said ships or vessels, without the knowledge or privity of the owner or owners, by means whereof merchants and others are greatly discouraged from adventuring their fortunes, as owners of ships or vessels, which will necessarily tend to the prejudice of the trade and navigation of this kingdom." It is, therefore, "for ascertaining and settling how far owners of ships and vessels shall be answerable for any gold, silver, diamonds, jewels,

(*f*) Art. 167, 2 *Magens*, 107.

(*g*) Art. 126, 127; 2 *Magens*, 101, 102.

(*A*) *Tom.* 1, p. 569.

(*i*) An extract from the Ordinance of *Hamburgh*, dated 1731, is given in 2 *Magens*, but the article containing this provision is not noticed.

(*k*) See *Commons' Journals* for the

year 1733, p. 277. The case referred to by the petition, appears clearly to be that of *Boucher v. Lawson*, cited in part 2, chap. 2, sect. 3. The bill went through both Houses without a division. The clauses directing proportional compensation and relief in equity, were introduced in the House of Lords.

precious stones, or other goods or merchandizes, which shall be made away with by the masters or mariners, without the privity of the owners thereof," enacted, "That no person or persons, who is, are, or shall be owner or owners of any ship or vessel, shall be subject or liable to answer for, or make good to any one or more person or persons, any loss or damage by reason of any embezzlement, secreting, or making away with by the master or mariners, or any of them, of any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise, which from and after the 24th day of *June* 1734, shall be shipped, taken in, or put on board any ship or vessel, or for any act, matter or thing, damage or forfeiture, done, occasioned, or incurred, from and after the said 24th day of *June* 1734, by the said master or mariners, or any of them, without the privity and knowledge of such owner or owners, further than the value of the ship or vessel, with all her appurtenances, and the full amount of the freight due, or to grow due, for and during the voyage, wherein such embezzlement, secreting, or making away with as aforesaid, or other malversation of the master or mariners, shall be made, committed, or done; any law, usage, or custom to the contrary thereof in anywise notwithstanding" (*l*).

3. And by the *second* section of the same statute, if several freighters sustain losses exceeding in the whole the value of the ship and freight, they are to receive compensation thereout in proportion to their respective losses; and any one freighter, on behalf of himself and the other freighters, or any part-owner, on behalf of himself and the other part-owners, may file a bill in a court of equity for the discovery of the total amount of the losses, and of the value of the ship, and for an equal distribution and payment.

But by the *third* section, if such bill is filed by or on behalf of the part-owners, the plaintiff must make affidavit that he does not collude with the defendants, and must offer to pay the value of the ship and freight, as the Court shall direct.

4. And by the *fourth* section, it is provided, declared, and enacted, "That nothing in this present act contained shall extend, or be construed to extend, to impeach, lessen, or discharge any remedy, which any person or persons now hath, or

(*l*) 7 Geo. 2, c. 15, A.D. 1734.

shall, or may hereafter have against all, every, or any the master and mariners of such ship or vessel, for or in respect of any embezzlement, secreting, or making away with any gold, silver, diamonds, jewels, precious stones, or merchandize, shipped or loaded on board such ship or vessel, or on account of any fraud, abuse, or malversation of and in such master and mariners respectively; but that it shall and may be lawful to and for every person or persons so injured or damaged, to pursue and take such remedy for the same, against the said master and mariners respectively, as he or they might have done before the making of this act."

5. By this statute, therefore, the legal responsibility of the *master* is left unaltered in all the cases before enumerated, and that of the *owners* also in the case of a robbery committed by persons *not* belonging to the ship. But where a ship in the river *Thames* was forcibly plundered of dollars during the night by a gang of robbers, in consequence of information given by one of the mariners of the ship, who afterwards shared the booty; the responsibility of the owners was held not to extend beyond the value of the ship and freight by virtue of this statute (*m*).

6. Immediately after the decision of this case, and in consequence of the danger, to which the facts that were disclosed in it, showed the owners to be exposed, another petition was presented to the House of Commons (*n*) on behalf of several owners of ships belonging to *London* and other ports, and in compliance therewith, another statute was passed (*o*), fixing the same limits to the responsibility of the owners in the several cases mentioned in the preceding statute, and also in the case of robbery, "although the master or mariners shall not be in anywise concerned in or privy to such robbery, embezzlement, secreting, or making away with." This statute also contains the same provisions as the preceding act, for equal distribution and discovery by bill in equity, and also for remedy against the master and mariners: and (as was mentioned in the preceding chapter) has entirely taken away the responsibility of the owners in the case of loss or damage by *fire* (*p*).

(*m*) *Sutton v. Mitchell*, 1 Term Rep. K. B. p. 18.

(*n*) See Commons' Journals for the year 1786, p. 296. This act also was

passed without a division in either House of Parliament.

(*o*) 26 Geo. 3, c. 86, s. 1.

(*p*) Chap. 4, of this part, s. 8, p. 259.

7. By 53 Geo. 3, c. 159, this limitation of the responsibility of the owners has been still further extended, for it is enacted, "That no person or persons who is, are, or shall be, owner or owners, or part-owner or part-owners, of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted, or occasioned without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandize or other thing, laden or put on board the same ship or vessel after the 1st of *September* 1813, or which after the said 1st of *September*, may happen to any other ship or vessel, or to any goods, wares, merchandize, or other thing, being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage, which may be in prosecution, or contracted for at the time of the happening of such loss or damage" (*q*).

By this statute, it is also enacted, that the value of the carriage of goods belonging to any of the owners of the ship, and also the hire due or to grow due, under any contract, except only such hire as in the case of a ship hired for time, may not begin to be earned until the expiration of six calendar months after the loss, shall be considered as freight within the meaning of this act, and also of the two prior acts, that have been before mentioned (*r*). It is also further enacted, that in case any such loss or damage shall happen by more than one separate and distinct accident and so forth, or on more than one occasion in the course of a voyage, or in the interval between the end of one voyage and the commencement of another, every such loss or damage shall be compensated according to the provisions of the act, in the same way and to the same extent as if no other loss or damage had happened during the same voyage or in the same interval (*s*); but this act does not extend to any vessel and solely in rivers or inland navigation, or to any ship or vessel *not duly registered according to law* (*t*).

This act also contains a provision against taking away the responsibility of the master or mariner of any ship, notwithstanding he may be an owner or part-owner thereof (*u*). And that each

(*q*) 53 Geo. 3, c. 159, s. 1.

(*r*) Sect. 5.

(*r*) Sect. 2.

(*u*) Sect. 4.

(*s*) Sect. 3.

individual sufferer may bring his action against the owner, although others have suffered by the same act or accident, or on the same occasion (*v*).

That where several persons shall have sustained loss, and the value of the vessel shall be insufficient to make full compensation to all, the owners may exhibit a bill in Equity against all parties claiming or entitled to recompense for losses arising from one and the same act or accident, or on the same occasion, in order to the ascertaining of the value of the ship, appurtenances, and freight, and for payment or distribution thereof, rateably among such claimants; that to this bill the plaintiff shall annex an affidavit, setting forth that he does not collude with any of the defendants or other persons, but that the bill is filed for the purpose only of justice, and to obtain the benefit of the provisions of the act; that the defendants are, so far as he believes, the only persons claiming recompense for loss sustained on the same occasion; that the value of the ship, appurtenances, and freight, does not exceed a sum to be specified in such affidavit; and that the claims of the defendants exceed, in the aggregate, that value; that on filing the bill, the plaintiff shall pay into Court the value so specified, no defendant being compellable to answer until this has been done, or security given instead thereof, if so ordered by the Court: that for default in this respect, the bill shall, at the expiration of one month, stand dismissed, with costs to be paid to the defendants; and that if the bill be dismissed, after payment of the money into Court, the money so paid in shall be apportioned and distributed by the Court among the several claimants (*w*). That if it shall appear to the Court that the true value has not been paid in, an order may be made for the payment of a further sum, or the giving of a further security (*x*). That the preliminary proceedings being regularly perfected, the Court shall take all such measures as shall seem just, for ascertaining the value of the ship, appurtenances, and freight, the amount of the losses or damages claimed by the defendants respectively, and whatever else may be necessary for doing justice in the suit, and for payment and distribution of the value among the several persons entitled (*y*).

(*v*) 53 Geo. 3, c. 15^c, s. 6.

(*w*) Sect. 7.

(*x*) Sect. 8.

(*y*) Sect. 10.

That a bill filed by one part-owner shall be binding on the rest (z); and that any sum paid on account of such damage, or of any cost incurred in relation thereto, may be brought into account among the part-owners as money disbursed for the use of the vessel.

As this statute appears in the case of *registered* ships, to comprise the several accidents and neglects which had been provided for by the two former statutes, and may now with regard to *such* ships be considered for most, if not all purposes, as containing the law upon this subject, and is of very general import, it has been thought right to print the statute at large in the Appendix.

The value of the ship is to be calculated at the time of the loss or damage; in calculating the value of the freight, money actually paid in advance, is to be included (a); but the value is to be only the amount that the ship would have earned if she had completed her voyage, and not the amount estimated at the commencement of the voyage, if diminished by jettison or other losses (b). If an action be brought against the several part-owners, one of whom happened to be master of the ship at the time of the loss, all the defendants are in that action entitled to the benefit of the limitation given by the statute. By the law of *England*, the damage to be recovered in an action brought against several persons, must be one and the same sum, judgment cannot be given against one defendant, for a sum differing from that for which it is given against another (a).

The acts do not extend to lighters and gabbets (c).

The fishing stores of a ship employed in the usual manner in the *Greenland* Fishery belonging to the owners of the ship are to be valued as part of the ship and her appurtenances under these statutes, although they are not usually so estimated in policies of insurance, but made the subject of a separate assurance (d).

(z) 53 Geo. 3, c. 159, s. 14.

(a) *Wilson v. Dickson and Others*, 2 B. & A. 2.

(b) *Cannan and Others v. Meaburn*, 1 Bing. 465.

(c) *Hunter & Co. v. M'Gown and Others*, 1 Bligh. 573.

(d) *Gale v. Laurie and Others*, 5 B. & C. 156, 1 Haggard, Ad. Rep. 109.

CHAPTER VII.

OF THE GENERAL DUTIES OF THE MERCHANT.

1. THE general duties of the merchant (those only excepted which relate to the payment of freight and of gross average, and which will form the subject of distinct chapters) are comprised in a very narrow compass: the hirer of anything must use it in a lawful manner, and according to the purpose for which it is let. The merchant must lade no prohibited or uncustomed goods, by which the ship may be subjected to detention or forfeiture (a). In general, even in the Case of affreightment by charter-party, the command of the ship is reserved to the owners or the master appointed by them, and therefore the merchant has not the power or opportunity of detaining the ship beyond the stipulated time, or employing it in any other than the stipulated service, but by the charter-parties under which ships are let to the *East India Company*, the command and disposal of the ship are reserved to the Company, and the master, although appointed by the owners, is bound to obey the orders of the Company at home, and of their factors and servants abroad; and it is always stipulated, that nothing shall be paid by the Company for freight or demurrage, unless the ship returns home in safety (b). Yet, in a case where the Company detained a ship so long in *India* that she became unfit for the voyage home, and was disposed of there, so that by reason of the particular stipulations, the owners could sustain no action at law upon the contract, a Court of Equity ordered the Company to make a proper allowance for the actual and probable earnings and the value of the ship (c). So where a ship, hired by the Company, to be employed according to the then usual terms

(a) *Roccus*, not. 85; Dig. 19, 2, 61, 1.; French Ordinance, liv. 3, tit. 3; Fret. art. 9.

(b) See the clauses cited in *Hotham v.*

East India Company, ante, chap. 1 of this part, sect. 15, p. 254.

(c) *Edwin and Others v. East India Company*, 2 Vern. 210.

of their charter-parties in trade and warfare, was sent upon a service of observation and discovery, to explore the passage to the eastward of the *Isle of Banca*, and there struck on a rock, and was lost, and the owners brought an action against the Company for thus exposing the ship to danger in a service not warranted by the charter-party without their knowledge or consent, Lord *Kenyon*, before whom the cause was tried, declared himself to be of opinion, that the action was proper in point of general principle, but the plaintiffs failed in their suit, because it appeared that the Company's intention to employ the ship in this service was, before her departure from *England*, made known to the person who managed the ship on behalf of the owners, and not objected to on their part (*d*).

2. Some of the ancient maritime codes and more modern foreign ordinances (*e*) have fixed the payment to be made by the merchant, who having taken a ship to freight, declines to lade her in pursuance of this agreement, or who, before the commencement, or during her course of the voyage, withdraws his goods from the ship, or having hired a ship to go to a distant port, and engaged to furnish a cargo homeward, fails to do so, whereby the ship is forced to return empty; and have decided that in some instances the whole, in others, a moiety of the sum, that would have become due as freight, shall be paid as compensation to the owners. But in all these cases the law of *England* leaves the amount of the compensation to be ascertained by a jury, if the parties cannot agree about it: and a jury will form their estimate upon a consideration of all the circumstances of the case, and of the real injury sustained by the owners, which cannot be properly settled by positive rules.

3. We have seen by a copy of the bill of lading (*f*), that the master undertakes to deliver the goods upon the payment of freight with primage and average accustomed.

(*d*) *Lewin and Others v. India Company*, Peake's Cases at Nisi Prius. p. 241. It was an action upon the case, and the plaintiffs were nonsuited; they afterwards brought another action in the Court of Common Pleas, which was tried before Lord Eldon, at the Sittings after Hil. Term, 1800, and were again nonsuited on the same ground. The terms of the charter-parties were afterwards altered,

and the ships hired to be employed in trade and in warfare, and on any other service whatsoever.

(*e*) Ordin. of the Hanse Towns, art. 11; French Ordin. liv. 3, tit. 3; Fret. art. 3 and 6, and 8 and 9, and Valin thereon; Guidon, Chap. 9, art. 11; Code de Commerce, art. 288, 291.

(*f*) Chap. 3 of this part, sect. 2.

The word *primage* denotes a small payment to the master for his care and trouble, which he is to receive to his own use, unless he has otherwise agreed with his owners. This payment appears to be of very ancient date, and to be variously regulated in different voyages and trades. In the *Guidon* it is called "*la contribution des chausses ou pot de vin du maitre.*" It is sometimes called the master's hat money.

It has been held, that *primage* is primarily payable to the master, and that he may maintain an action for it although the freight has been separately adjusted. If, however, by the contract between the owner and the master, the master is not to receive *primage*, he can maintain no action for it, and cases may also arise when a contract between the owner and shipper which excludes *primage*, may be brought to the knowledge of the master, and prevent him from having any right to claim it (*g*).

The word *average* in this place denotes several petty charges, which are to be borne partly by the ship and partly by the cargo, such as the expense of towing, beaconage, &c. Some of the foreign ordinances specify the particulars that fall under this head, and the mode of distributing the charge (*h*) but with us they depend entirely upon usage, and an attempt to enumerate them would afford neither instruction nor entertainment.

This and the preceding article of *primage* are often commuted for a specific sum or a certain per centage on the freight.

(*g*) Best v. Saunders, 1 M. & M. 208.

(*h*) French Ordinance, liv. 3, tit. 7 ;
Avaries, art. 8 & 9, and Ordin. of Stockholm, tit. Average, art. 1 ; 2 Magens, 277 ; Ordin. of Wisbuy, art. 44, 56, 59,

60 ; Guidon, chap. 5, art. 12 to 19, and Cleirac on the 24th art. of the Laws of Oleron. But by the Code de Com. art. 406, the expense of towage, &c., is to be borne by the ship alone.

CHAPTER VIII.

OF THE PAYMENT OF FREIGHT.

1. IN treating of the payment of the *freight*, the principal duty of the merchant, I shall consider, *first*, the cases in which the entire freight is to be paid according to the terms of the contract, and, *secondly*, those in which a part only of the stipulated sum may be claimed.

The contract for the conveyance of merchandize is in its nature an entire contract, and unless it be completely performed by the delivery of the goods at the place of destination, the merchant will in general derive no benefit from the time and labour expended in a partial conveyance, and consequently be subject to no payment whatever, although the ship may have been hired by the month or week. The cases in which a partial payment may be claimed are exceptions founded upon principles of equity and justice, as applicable to particular circumstances.

§ But although by the policy of the law freight, strictly so called, does not become due until the voyage has been performed, it is competent to the parties to a charter-party to covenant by express stipulations in such manner as to control the general operation of law. If the charter-party be silent, the law will demand a performance of the voyage, for no freight can be due until the voyage is completed. But if the parties choose to stipulate by express words, or by words not express, but sufficiently intelligible to that end, that a part of the freight should be paid absolutely by anticipation, and not depend upon the performance of the voyage, they are at liberty to do so (a). Such stipulations are by no means uncommon, for the owner of a ship frequently has no agent at the port of loading, but the freighter always has, and therefore, naturally enough,

(a) Per Lord Ellenborough in *De Silvale v. Kendall*, 4 M. & S. 37, post. 362.

stipulates to advance money to the owner, which, upon the ship's safe arrival, is deducted from the freight. §

In this country it is not unusual to pay for goods shipped for the *East* and *West Indies* at the time of shipment; but this payment, although in common parlance called freight, is not in strictness properly so denominated, that word denoting the price rather of *actual* carriage than of receiving goods to be carried.

Accordingly in the case of *Blakey v. Dickson (b)*, Lord Eldon and the Court of Common Pleas, admitting that an action might be brought for money, agreed to be paid for receiving goods on shipboard, *in order to be transported*, decided that such money could not be sued for or recovered by the name of freight.

Some time after this determination, an action was brought upon a supposed agreement of the nature here alluded to; the plaintiff alleging, that in consideration of his undertaking to receive on board his ship certain goods belonging to the defendant, to be carried therein from *London* to *Lisbon*, the defendant promised to pay him a certain sum of money *on the shipment* of the goods. The bills of lading were the only evidence offered by the plaintiff at the trial of the cause to prove his allegation: these imported, in the usual way, that the goods were to be delivered at *Lisbon*; but the clause respecting the payment of freight, in some of them, ran thus, "freight for the said goods being paid in *London*;" and in others, thus, "the shippers paying freight for the said goods in *London*. The ship was lost on the voyage. Lord *Ellenborough*, before whom the cause was tried, was of opinion, that these words meant no more than that the freight should be paid in *London* instead of *Lisbon*, and did not dispense with the performance of the voyage; and added, that if the shipper had paid the freight upon the shipment of the goods, he might have recovered it back again. The plaintiff, therefore, failed in his suit (c).

This case turned *wholly* on the bill of lading; there was no indication of an intent, that if the freight were not earned, the money might not be recovered back; but in a cause since decided in the Common Pleas, the bill of lading containing the words "freight for the said goods being paid," the broker who freighted the ship proved that the contract for the conveyance of the goods

(b) 2 Bos. & Pull. 321.

(c) *Mashiter v. Buller and Another*, 1 Campb. 84.

was verbal, and that he told the defendant that the price of the freight of goods upon a voyage from *London* to the *Cape*, was 5*l.* paid in *London*, or 7*l.* paid at the *Cape*; the defendant preferred the contract at 5*l.* per ton. Soon after the vessel had sailed, the broker called on the defendant for payment, who answered, he would call and pay it on the following Monday. The ship was lost. *Gibbs*, Chief Justice, left it to the jury to consider, whether the agreement intended merely to change the place where the freight should be payable, in case any freight should be earned, or whether, in lieu of a contract for freight, it was intended that this sum should be payable at all events after shipping the goods; and the jury found, that the meaning of the agreement was, that the money should be paid at all events upon the delivery of the goods on board the ship at *London*. The Court refused to disturb the verdict, and *Gibbs*, Chief Justice, said, "Here is an indication not only of the place where the money was to be paid, but also of the time when it was to become due, which was not the case in *Mashiter v. Buller*," and added, "it signifies not what name is given to the money. The defendant is misled by the ambiguity of the phrase *freight*. There is no doubt but that a man may agree to pay money on the delivery of the goods on board the ship, call it what you will" (*d*).

Whether money advanced by the merchant is to be considered as a loan to be reimbursed by the owner, or as part payment of the freight, not dependent upon the determination of the voyage, must depend upon the terms of the written instrument, upon the construction of which the question arises. A charter-party contained a covenant, that "120*l.* should be paid upon freight of the outward cargo to *Maranham*, and as much cash as might be found necessary for the vessel's disbursements in *Maranham*, to be advanced by the merchant, his agents or assigns, to the master when required, *free from interest and commission* at the current exchange of the place, and the residue of such freight to be paid on delivery of the homeward cargo in *Liverpool*." The ship having been lost by capture, the Court of King's Bench decided that the merchant was not entitled to recover back, under this charter-party, money advanced by him for the vessel's disburse-

(*d*) *Andrew and Another v. Moorhouse*, 5 Taunt. 435, and 1 Marsh. 122.

ments in *Maranham* (d). But where the words, "The captain to be supplied with cash for the ship's use," followed a covenant for payment of freight, one-half in cash on unloading and right delivery of the cargo, and the remainder by bill on *London*, at four months' date, § Lord *Tenterden* said, "The case of *De Silvale v. Kendall* turned upon the particular words of the instrument, which was studiously framed, so as to make the freighter lose the money advanced by him, unless the owner reaped the benefit by the ship's coming home safe. The present charter-party, however, is in a very different form. It is undoubtedly competent for the owner to make such a stipulation as that in *De Silvale v. Kendall*; but if he does so, it is his duty to take care that it is inserted in clear and explicit words in the charter-party, that the money advanced shall be an advance in part payment of the freight (e).

In a subsequent case (f), by charter-party for a voyage from *London* to *Calcutta* and back, it was agreed that the freighter, if he thought proper, might hire the vessel for an intermediate voyage, within certain limits, for not less than six months; and, in that event, the master should refit the vessel for such voyage. The complement of men was to be kept up, and all necessities provided; the freighter on his part agreeing to pay the owner for such voyage the sum of 1*l.* a ton per month on the ship's tonnage, *to pay four months of such hire in advance*; and at the end of six months, two further months' pay, and so in every succeeding two months; and the balance due at the termination of such hiring, in cash or approved bills. It was further stipulated, that if the vessel should be lost or captured, the freight by time should be payable up to the period when she should be so lost or captured, or last heard of. The freighter took the vessel for the intermediate voyage, in the course of which, and before the expiration of the four months, for which payment had been made in advance, she was lost. He then claimed to have the money so advanced returned to him, and contended, that the last-mentioned clause, by which it was stipulated that the freight should be payable only to the time at which the vessel might be lost, was inconsistent with the owner's title

(d) *De Silvale v. Kendall*, 4 M. & S. 37.

(f) *Saunders v. Drew*, 3 B. & Ad.

(e) *Mansfield v. Maitland*, 4 B. & A. 445.
582.

to the whole four months' freight. But the Court rejected the claim, and Lord *Tenterden*, C. J., said, "The law is thus laid down by *Saunders*, C. J., in *2 Shower*, 283:—'Advance money paid before, if in part of freight, and named so in the charter-party, although the ship be lost before it come to a delivering port, yet wages are due according to the proportion of the freight paid before,—*for the freighters cannot have their money.*' This is the ground of the doctrine which was acted upon in *De Silvale v. Kendall*, that money paid in advance of freight cannot be recovered back."§

With respect to living animals, whether men or cattle, which may die during the voyage, without any fault or neglect of the persons belonging to the ship, it is said (*g*), that if there be no express agreement whether the freight is to be paid for the lading or for the transporting them, freight shall be paid as well for the dead as for the living. If the agreement be to pay freight for the lading them, their death certainly cannot deprive the owners of the freight. If the agreement be to pay freight for *transporting* them, then no freight is due for those that die on the voyage, because, as to them, the contract is not performed. These distinctions are found in the civil law, and adopted by all the writers on this subject (*h*).

If a pregnant woman be delivered during the voyage, no freight is due for the infant (*i*).

An interruption of the regular course of the voyage happening without the fault of the owner, as by capture and re-capture, or by embargo, does not deprive him of his freight, if the ship afterwards proceed with the cargo to the place of destination (*k*).

2. When goods are sent in a general ship, in pursuance of the second species of contract before mentioned, the amount of the freight is either settled by the agreement of the parties, or by the usage of the trade. In the case of a charter-party, if the stipulated payment is a gross sum for an entire ship, or an entire part of a ship, for the whole voyage, the gross sum will be payable,

(*g*) Dig. 14, 2, 10; *Roccus*, not. 76, 77, 78; *Molloy*, book 2, chap. 4.

(*h*) *Moffat v. East India Company*, 10 East, 468.

(*i*) *Roccus*, not. 79; *Molloy*, book 2, p. 4, sect. 8.

(*k*) *The Racehorse*, White, 3 Robs. Ad. Rep. 101; *Beale v. Thompson*, 3 Bos. & Pull. 420 and 431, upon the dictum of *Eyre*, Ch. J. in *Curling v. Long*, 1 Bos. & Pull. 637.

although the merchant have not fully laden the ship. And if a certain sum be stipulated for every ton, or other portion of the ship's capacity, for the whole voyage, the payment must be according to the number of tons, &c. which the ship is proved capable of containing, without regard to the quantity actually put on board by the merchant (*m*), or to the number of tons burthen mentioned in the description of the ship (*n*). On the other hand, if the merchant has stipulated to pay a certain sum per cask or bale of goods, the payment must be, in the first place, according to the number of casks or bales shipped and delivered (*o*); and if he has covenanted to pay freight on skins by the pound, net weight at the king's beam, freight is due on the outside skins, in which the packages are contained (*p*). And where, again, he has covenanted to furnish a complete lading, or a specific number of casks or bales, or certain enumerated articles, and failed to do so, he must make good the loss which the owners have sustained by his failure, to be settled, in case of disagreement, by a jury, who will take all the circumstances into their consideration, and make a due allowance to the merchant for the profit which the master may have made by bringing the goods of other persons, if any have been brought (*q*). In all such cases, whether the ship return empty or laden with a cargo of articles different from those enumerated (*r*), the proper course is to estimate the freight by means of an average, so as to take neither the greatest possible freight nor the least; and such an average is the proper measure of damages (*s*). And in a cause where the charterer of a ship, for a voyage to *Tobago* and back, covenanted to load and dispatch her in time to join the convoy that should be appointed to sail from the *West Indies*, on the 1st of *August*, it was held that he was liable for not having loaded and dispatched her by the 22d

(*m*) *Roccus*, not. 72, 75.

(*n*) *Hunter v. Fry*, 2 B. & A. 421.

(*o*) *Roccus*, not. 73, 75. A bill of lading, dated at Dantzic, contained in the margin, the words one hundred lasts of wheat in two thousand and ninety-two bags. It was not proved that the wheat had been measured, but evidence was given that the Dantzic measure was larger than the English, and that the wheat was brought by the latter. The freight was to be a certain sum per last; and it was held that the specified number of bags

must be considered as between the parties to contain one hundred lasts, as mentioned in the bill of lading, *Molloy v. Living*, 4 Taunt. 102.

(*p*) *Moorsom v. Page*, 4 Campb. 103. See also p. 365.

(*q*) *Puller and Another v. Staniforth*, 11 East, 232. See before, chap. 1 of this part, sect. 11, p. 242.

(*r*) *Capper v. Foster*, 3 Bing. N. C. 938; *Irving v. Clegg*, 1 Bing. N. C. 53.

(*s*) *Thomas v. Clarke and Another*, 2 Stark. 450.

of *July*, the day the *West India* convoy passed the island of *Tobago*, although he offered to load her with a complete cargo, if she would stop a few days longer; and a verdict was obtained for the amount of the dead freight claimed (*t*).

In an action against the merchant for not loading and dispatching the ship, according to the memorandum for charter, wherein she was described as "the *Swedish* ship or vessel called the *Maria*," he cannot set up as a defence, that she was in point of fact a *British*, and not a *Swedish* ship (*u*). And where the payment is to be made by cask or bale, the merchant must pay for what has been brought, although the master engaged to bring a full cargo and refused to do so,—the proper remedy for such refusal being an action against the master upon his covenant, as hath been before observed (*v*). Where a ship, hired to go beyond sea to fetch home a cargo, for which a certain rate *per ton* was to be paid (nothing being payable for the outward voyage), was forced to return in ballast, the merchant's factor having no goods to put on board, the Court of Chancery decreed payment of the freight (*w*).

If an entire ship be hired, and the burthen thereof expressed in the charter-party, and the merchant covenant to pay a certain sum for every ton, &c. of goods which he shall lade on board (*x*), but do not covenant to furnish a complete lading, the owners can only demand payment for the quantity of goods actually shipped (*y*). And where the merchant covenanted to provide a full and complete cargo, consisting of copper, tallow, and hides, or other goods, on which separate rates of freight were to be paid, it was held, that having supplied her with as large a quantity of tallow and hides as she chose to take on board, he was not bound to provide any copper, although, from the want of it, the ship was obliged to keep in her ballast, and did not make so advantageous a freight as she otherwise would have done (*z*).

That where, by the terms of the charter-party, the freight is

(*t*) *Thompson v. Inglis and Others*, 3 Campb. 428.

(*u*) *Reusse v. Meyers*, 3 Campb. 475.

(*v*) *Ritchie v. Atkinson*, 10 East, 295. See before, chap. 1 of this part, sect. 13 p. 246.

(*w*) *Westland v. Robinson*, cited 2 Vern. 212.

(*z*) The merchant freighter cannot insist upon the precise burthen mentioned

in the charter-party, unless the misrepresentation has been fraudulent. *Thomas v. Clarke*, 2 Stark. 452.

(*y*) *Lady James v. East India Company*, *Coram Kenyon*, Ch. J., at Guildhall, Sit. p. Mich. Term, 1789; *Roccus*, not. 75.

(*z*) *Moorsom v. Page*, 4 Campb. 103; *Irving v. Clegg*, 1 Bing. N. C. p. 53, see p. 364.

made payable according to the quantity of goods, the merchant must pay for so much as shall be delivered, appears from the following case.

The ship *True Briton* was chartered for a voyage from *Shields* to *Hamburgh*. The master engaged to take a full cargo of coals, and to proceed to *Hamburgh*; and on his arrival, to deliver the same to the merchant or his assigns, at such convenient place or places where the ship and cargo might safely come; and for the delivery, to be at the rate of one working day per keel of coals. The merchant engaged to load the cargo, and also to receive it at *Hamburgh* within the time limited, and to pay in full for the freight of the ship for the voyage, at the rate of 20*l.* per keel, on delivery of the cargo, with two-third parts of the pilotage and port charges. Under this charter-party the merchant loaded seventeen keels of coals, with which the ship proceeded towards *Hamburgh*, and arrived at *Cuxhaven*, so near to *Hamburgh*, that the voyage might have been completed in the course of the day; but the master, being ordered by the commander of his Majesty's ships on that station to proceed no further, because the *French* forces were approaching *Hamburgh*, sent notice of his arrival to the merchant's correspondents at *Hamburgh*, who desired him to sail as far as *Gluckstadt*, where they would send him lighters. The master accordingly sailed to *Gluckstadt*, and there delivered seven keels and one chaldron of coals into the lighters that were sent. The delivery was at the rate of one keel per working day. The ship staid long enough to have delivered the whole quantity, if lighters had been sent to receive it. On the ninth day, the master returned to *Cuxhaven*, by order of the *British* consul and of the commander of his Majesty's ships,—the *French* having entered *Hamburgh*; and shortly afterwards, by the order of the same persons, sailed away with the residue of his cargo, and brought it back to *Shields*, having remained in the whole *fifteen* days only from his first arrival in *Cuxhaven* roads, being less than the time stipulated in the charter-party. This, however, contained the usual exceptions of perils of the seas and restraint of princes and rulers; and the master having by this restraint been prevented from delivering his whole cargo, was held entitled to the rateable freight for the quantity delivered, and also to the two-third parts of the pilotage and port charges (*a*).

(*a*) *Christie v. Row*, 1 Taunt. 300.

3. In all the instances before mentioned, the owners take upon themselves the chance of the long or short duration of the voyage. But if the merchant engage to pay a certain sum for every month, week, or other portion of the voyage, in this case the risk of the duration falls upon the merchant ; and if no time be fixed for the commencement of the computation, it will begin from the day on which the ship breaks ground and commences the voyage, and will continue during the whole course of the voyage, and during all unavoidable delays not occasioned by the act or neglect of the owners or master, or by such circumstances as work a suspension of the contract for a particular period (*b*). Thus the freight will be payable for the time consumed in necessary repairs during the voyage, if it do not appear that the ship was insufficient at the outset, or that there was any improper delay in repairing her (*c*). So, in the case of a ship hired for a voyage to any port or ports in *St. Domingo* and back to *London*, which, having discharged part of her cargo at one port in that island, was peremptorily ordered by the supercargo to proceed to another, then under blockade by General *Christophe*, by one of whose cruizers she was taken on the way, and detained for some weeks, during which time the remainder of the cargo was confiscated. The ship being afterwards liberated, and having brought home a cargo, Lord *Ellenborough* thought, " that as the ship was taken in proceeding to a port by order of the supercargo, the voyage was never discontinued, and the freighters were answerable for the subsequent detention, in the same manner as if it had arisen from contrary winds or from embargo"; and the owner recovered the monthly freight for the period of detention (*d*).

In this case of the payment of freight, as in other mercantile contracts, a month is to be understood of a *calendar*, not a *lunar* month (*e*).

4. The time and manner of payment of freight are frequently regulated by express stipulations in a charter-party, and when

(*b*) See the judgment delivered by Mr. Justice of Heath, in the case of *Beale v. Thompson*, 3 B. & P. 405.

(*c*) *Havelock v. Geddes and Others*, 10 East, 555; *Ripley v. Scaife*, 5 B. & C. 167.

Si le maitre est contraint de faire doubler son vaisseau pendant le voyage le

chargeur, sera tenu d'attendre ou de payer le fret. entier.—Ordon. de la Marine. liv. 3, tit. 3, s. 11, Code de Commerce, art. 296.

(*d*) *Moorsom v. Greaves and Others*, 2 Campb. 627.

(*e*) *Jolly v. Young*, 1 Esp. N. P. C. 186.

that is done, the payment must be according to the agreement. If there be no express stipulation, we have already seen that the master is not bound to part with the goods, until his freight is paid; and where, by the regulations of the revenue, the goods are to be landed and put into the King's warehouse, if the duties are not paid, the master may enter them in his own name, and thereby preserve his lien.

It is often provided in charter-parties, that the goods shall be delivered agreeably to bills of lading to be signed by the master; and the master, upon receiving the goods, signs bills of lading for delivery *on payment of freight*, or with words of similar import, giving him a right to refuse to make delivery to the person designated by the bill of lading, without payment of the freight. *And, as it has sometimes happened that the master has not insisted upon the exercise of this right, it has been much questioned whether the merchant-charterer was answerable for the freight; and it has been decided that he is answerable.*

The earliest case on this point came originally before Lord *Kenyon* at Guildhall, and he was of opinion that the merchant was not answerable; but the Court of King's Bench being afterwards of a different opinion, the cause was tried a second time, and the merchant was compelled to pay (*f*). In that case, the bills of lading were for delivery to the defendant (who was the charterer) *or his assigns, he or they paying the freight*: he indorsed them specially to K. & Co., on condition only that they would accept, or in writing promise to accept, certain bills of exchange, and would also promise in like manner to account with R. & Co., to whom half the cargo belonged, for a moiety of the proceeds, and on their refusal so to do, then to deliver to D. and Co., first obtaining from them a similar promise in writing to accept the bills, and to account to the defendant for a moiety of the proceeds. K. and Co. refused, and the cargo was delivered to D. and Co., but no promise in writing was obtained from them. They did, however, in fact, pay the bills, and account for the defendant's moiety, and gave him credit for all the freight; notwithstanding which he continued

(*f*) *Penrose and Others v. Wilks*, Sit. after Hil. Term, 1790. The following account of the bills of lading, &c., is taken from the judgment of the Court as delivered by Lord Ellenborough in *Shep-*

ard v. De Bernales, 13 East, 570. The note from which this case was quoted in the first edition of this book, was taken by the author very early in his professional life.

greatly in their debt. Lord *Kenyon* thought, upon the first trial, that the bill of lading imposed upon the captain the obligation at his peril to get the freight on delivering the cargo: but the Court thought otherwise, and granted a new trial. Upon the second trial, Lord *Kenyon* told the jury, that he conceived at the first trial, that the charter-party was controlled by the bills of lading, and imposed upon the plaintiff the duty of recovering the freight: but that the Court of King's Bench thought the bills of lading imposed no such duty upon him; and whatever his (Lord *Kenyon's*) private opinion was, he was bound to say he was at first mistaken. And the plaintiff thereupon had a verdict for 967*l.* 16*s.*

The next case upon this subject occurred about ten years afterwards. It was an action for freight upon a charter-party, wherein the defendant stipulated to pay the freight *on delivery of the cargo according to the bill of lading*. The form of the bill of lading is not mentioned in the report, but it was probably in the usual form. It was certainly intended that the freight should be paid by the consignee; he being indebted to the defendant in more than that amount. Part of the freight was paid abroad, but for *part* of it, viz. 500*l.* the master *took a bill* drawn by the consignee upon the *merchant*, but not accepted by him, and he sued upon the charter-party for this part of the freight. Now, had it been his duty to receive payment of the freight before he parted with his cargo, he would have taken this bill at his peril, and he could never afterwards have resorted to the defendant upon the charter-party: but, upon a case reserved, the Court of King's Bench thought it very clear that he was warranted in delivering the cargo as he did, and that the defendant was liable to the action (*g*). The same point was ruled by Chief Justice Gibbs in the case of *Marsh v. Pedder* at nisi prius, where the bill was accepted by a third person. (*h*)

In another case, which was before the Court of Common Pleas, there was a charter-party, and a bill of lading in the usual form, and the Court held that the master was not bound at his peril to insist upon his freight at the time of delivering the goods; but that if he delivered the goods, and could not afterwards get the

(*g*) Tapley v. Martens, 8 Term Rep.
in B. R. 451.

(*h*) 4 Campb. 257.

freight from the consignee, he might ~~see~~ the merchant for it upon the charter-party (i).

In the subsequent case of *Shepard v. De Bernales*, the three former were very much considered, and the decision of the Court of King's Bench was conformable to them. This arose on the charter-party of the ship *Hopewell*, by which the master engaged to receive a cargo of tobacco at *London*, and sail therewith to *Tangiers*, where he would apply to the correspondents, factors, or agents of the merchant, for orders, and wait for the same fifteen days, whether he was to deliver the cargo at that port, or proceed therewith to *St. Lucar* or *Cadiz*, and that having received such orders, he would, pursuant thereto, make a right and true delivery to the correspondents, factors, or agents of the merchant, agreeably to bills of lading; and the merchant covenanted to load a complete cargo, and also to receive the same at *Tangiers*, *St. Lucar*, or *Cadiz*, giving notice to the master at what port the cargo was to be discharged within fifteen days after the ship's arrival at *Tangiers*, and to pay to the master, immediately on a right and true delivery of the cargo, in full for the freight of the ship for the voyage, at the rate of 3*l.* 13*s.* 6*d.* per hhd. received out of her, together with 10*l.* per cent. on the amount of the said freight for primage, and thirty guineas as a gratification to the master. The ship received a cargo of tobacco; and the master signed bills of lading, expressing the ship to be bound for *Tangiers*, and from thence to *St. Lucar*, and that the cargo was to be delivered to one *John de la Piedra*, or in his absence, to his Catholic Majesty's Consul-General at *Tangiers*, or to their assigns, *he or they paying freight for the said goods*, three guineas and a half for each cask, 10*l.* per cent. primage, and thirty guineas gratification; the whole at the current exchange at *Cadiz* on *London*, with primage and average accustomed. Upon this charter-party, the master sued the merchant for the freight, &c., and alleged that the ship arrived at *Tangiers*, and that he there made application to *John de la Piedra*, the correspondent and agent of the merchant in that behalf, to know whether the delivery was to be there or at *St. Lucar* or *Cadiz*; that *John de la Piedra* ordered him to proceed with the cargo to *Cadiz*, whereby he was prevented from delivering to any of the correspondents, factors, or agents of the merchant at *Tangiers* or *St. Lucar*, according to the

(i) *Christy v. Row*, 1 Taunt. 300. See ante, p. 366.

bills of lading, and he proceeded, in obedience to the order, to *Cadiz*, and there delivered the cargo according to the orders and directions of one *Benito de la Piedra*, the agent of the merchant in that behalf. These facts were admitted by the merchant (*k*), who contended that the freight could not be recovered of him, for these reasons: first, because the master ought not to have delivered the cargo without receiving the freight; secondly, because he ought not to have gone to *Cadiz*, only *Tangiers* and *St. Lucar* being mentioned in the bill of lading; and thirdly, because he ought not to have delivered to the merchant's agent at *Cadiz*, who was said to be a stranger to the bill of lading. But the Court determined, that no one of the reasons assigned afforded a sufficient answer to the master's claim. As to the second reason, it was held that the omission of *Cadiz* in the bill of lading was for the master's benefit, to relieve him from going thither if he should wish to decline it, but that it did not take from him the power of going thither, if he should be willing to do so, and the merchant's correspondent should desire it; as to the third reason, it was held, either that *Benito*, the merchant's agent at *Cadiz*, might be looked upon as virtually the appointee of *John de la Piedra*, and so might take under the bill of lading as *his assign*; or that *John* must be considered as refusing to accept or to make any appointment, and then the master could not do otherwise than deliver to the agent of the merchant himself. Upon the first reason, which relates to the point, for which the case has been quoted in this place, Lord *Ellenborough*, in delivering the judgment of the Court, stated the question to be, whether this clause was introduced for the merchant's security, and made it incumbent on the master, at his peril, to look to the consignee under the bill of lading for payment of the freight, in which case he would have no right to deliver to the merchant's agent, without first receiving the freight, and a delivery without payment of it would not be "a right and true delivery;" or whether it was introduced for the master's benefit only, and merely to give him the option, if he should think fit, to insist upon receiving the freight abroad, before he would deliver the goods; in which case he might waive the benefit of this provision in his favour, and might deliver them without first receiving payment, and would not be thereby precluded from having resort to the merchant after-

(*k*) The cause came before the Court upon a demurrer to the declaration.

wards: and the Court held the latter to be the true construction of the contract. The former cases were considered as proving, that a clause of this kind does not in general cast upon the master the duty of obtaining, at his own peril, the freight from the consignee, but that if he cannot get it from *him*, he may insist upon having it from the charterer; and the particular circumstances of this case were held not to warrant the Court in saying that the contrary was intended by the parties to this contract (1).

§ In the recent case of *Domett v. Beckford* (m), there was no charter-party, but a bill of lading in the usual form. The captain having delivered the goods to the consignees without receiving the freight, the shipowners brought their action against the defendant, the consignor, to recover it. It was contended for the defendant, that the plaintiffs having undertaken by the bill of lading to "*deliver to the consignees, they paying freight,*" were bound to withhold the goods from the consignees until the freight was paid, and that having delivered them without having insisted on payment, they had no claim on the consignor; but Lord Denman at the trial, and the Court of King's Bench on motion, were of opinion that the defendant, the owner of the goods, and on whose account they were shipped, was *prima facie* liable to pay freight, that the clause in the bill of lading being introduced merely for the benefit of the master and shipowner, did not make it compulsory on the latter to withhold the delivery of the goods until payment of freight by the consignee, and consequently that the owner of the goods was not discharged from his liability by the neglect of the shipowner to obtain payment from the consignee. "The law," said Mr. Justice *J. Parke*, "will imply from the fact, that the goods were laden on a ship to be conveyed from *Jamaica* to *London*, a contract by the owner of those goods to pay for the carriage. The only difference between the present case and *Shepard v. de Bernales* is, that in the latter there was an express contract by charter-party."

The cases of *Tapley v. Martens*, and *Marsh v. Pedder*, in which the master, having taken a bill of exchange for the freight, sued, after it's dishonour, the owner of the goods, must not be understood as trenching upon the general principle established in several decided cases, that if a creditor entitled to immediate payment, voluntarily and for his own convenience take a bill of ex-

(1) *Shepard v. de Bernales*, 13 East, 565.

(m) 5 B. & Ad. 521.

change on a third person for his debt, he must abide the hazard of such security (n). In *Tapley v. Martens*, where the bill was drawn upon the merchant, but not accepted by him, Lord *Kenyon* seemed disposed to concede, that if the master had taken it for his own accommodation, it would have altered the case. In *Marsh v. Pedder*, Chief Justice *Gibbs* expressly says, "If the party having the offer of cash, merely for his own accommodation, prefers a bill of exchange, upon that he must seek his remedy. Here it is not stated, nor is it to be supposed that any offer to pay the whole of the freight in cash was ever made to him;" and this doctrine was expressly acted upon in the recent case of *Strong v. Hart* (o). The master and part-owner of the ship *Atlantic*, having carried a cargo from *St. John's, Newfoundland*, to *Bilboa*, and delivered it there to the consignees under a bill of lading, making the cargo deliverable to the consignor or his assigns, he or they paying freight for the same, took a bill for the freight on the agent of the consignees, which was dishonoured, and then sued the consignor. No direct evidence was given to show whether the master demanded payment in cash, and took the bill, because he could not obtain such payment, or preferred taking the bill as more convenient. Lord *Tenterden* told the jury, that if they thought the master took this bill voluntarily and for his own convenience, without insisting upon payment in cash, they were to find for the defendants; but if they thought the master took the bill because he could not obtain payment in cash, to find for the plaintiffs. The Court, on a motion for a new trial, approved of this direction.

The master, however, having no lien on the freight for his wages, has no right as against his owners to receive it, but only as their servant (p), and payment of the freight to the owners on their demand, will be a discharge against a claim by the master, not only in the case of goods brought in a general ship, but also in the case of an agreement *not under seal*, made between the master and the charterer, and although the master may have previously given notice to the charterer not to pay the freight to any person but himself (q). But payment to the absolute owner in discharge of his lien for freight, is available against a sub-charterer, with whom the merchant may have contracted for their carriage,

(n) *Everett v. Collins*, 2 Campb. 515;
Smith v. Ferrard, 7 Barn. & Cress. 19;
Robinson v. Read, 9 B. & C. 449.

(o) 6 B. & C. 160.

(p) *Smith v. Plummer*, 1 B. & A. 575.

(q) *Atkinson v. Cotesworth*, 3 B. & C. 647.

and the owner in such case can only claim the rate of freight agreed upon between himself and the charterer. Thus in the case of *Mitchenson v. Begbie* (*r*), the plaintiff by charter-party agreed with *G.* to convey corn at 4*s.* 6*d.* a quarter, *G.* made a sub-charter with *S.*, who consigned corn to the defendants under bills of lading, by which they were to pay 6*s.* a quarter freight, and gave them notice to retain 1*s.* 6*d.* a quarter for him. The plaintiff sought to recover freight at 6*s.* per quarter, but the Court of Common Pleas held that he was only entitled to the smaller rate, and *Tindal, C. J.*, said, "The plaintiff has no more right to the sum bargained for under the second contract, than a lessor would have to claim from an under lessee a higher rent reserved by the lessee."

A consignee who receives goods by a general ship under the usual bill of lading (by which it is expressed that he is to pay the freight) contracts by implication to pay the freight due on them. There is no assignment of contract. The contract of the consignor and consignee are not inconsistent with each other, each is an original contract (*s*).^c§

But a person, who is only an agent for the consignor, and who is known to the master to be acting in that character, does not make himself personally answerable for the freight by receiving the goods, although he also enters them in his own name at the Custom-house (*t*). In a case where the consignee, known as such to the master, sold the goods before they were landed, and the buyer received them, and entered them in his own name at the Custom-house, it was once held by Lord *Kenyon* that the consignee only, and not the buyer, could be sued for the freight (*u*), and this opinion seems to have been adopted by Lord *Stowell* in the decision of a cause before him (*v*). But the point, having been since more maturely considered, it has been decided, that although there be no original privity of contract between the purchasers from consignees and the owner, yet the taking of goods by purchasers under a bill of lading is evidence of a new agreement by them, as the ultimate appointees of the shippers, to pay the freight for the carriage of the goods, the delivery being stipulated with the shippers to be made to the consignees named in the

(*r*) 9 Bing. 190.

(*s*) *Dougal v. Kemble*, 3 Bing. 383; *Roberts v. Holt*, 2 Show. 443; *Moor-*
som v. Agnew, 2 M. & S. 303.

(*t*) *Ward v. Felton*, 1 East, 507.

(*u*) *Artaza v. Smallpiece*, 1 Esp. N. P. C. 23.

(*v*) *The Theresa Bonita, De Jong*, 4 Rob. Ad. Rep. 236.

bill of lading or their assigns, he or they paying the freight for the same (*w*). And this opinion seems consonant to sound reason; for if a person accepts any thing, which he knows to be subject to a duty or charge, it is rational to conclude that he means to take the duty or charge upon himself; and the law may very well imply a promise to perform what he so takes upon himself.

But on the other hand, if the indorsee of a bill of lading obtain goods *not under the bill of lading*, but under *an order signed by the consignees for that purpose*, this is not sufficient ground to raise an implied assumpsit on their part to pay the freight, even although the goods be entered at the Custom-house in their name, unless it appear from previous dealings that they were in the habit of receiving goods in the same manner, and paying freight for them, and this will then be considered sufficient to raise such an implied promise (*x*). § "The consignee," said Baron Parke, in a recent case (*y*) "is *prima facie*, the owner of the goods, but if he be not, he is not liable simpliciter as consignee, except on a new contract to pay the freight. That is evidenced in ordinary cases by the bill of lading. I accede to the decision in *Wilson v. Kymer*, that the same evidence may be deduced from the previous dealings between the parties. If the goods have always been delivered on payment of freight by the defendant, that is evidence, that in the particular case he agreed to pay it." § And the indorsee of a bill of lading, making goods deliverable to order or assigns, on payment of freight, although he has paid over the proceeds of the goods to the person who indorsed the bill of lading to him before being called upon to pay the freight, will still be liable for it (*z*).

In these several cases, the owner is not stated to have made any express stipulation for the payment of freight, under a charter-party, and the bill of lading was the only contract; but where there is a clear original contract under seal, and the indorsees of the bill of lading for valuable consideration, do not stipulate at the time of receiving the goods to pay the freight, as the law will not raise an implied promise from the mere receipt of the goods,

(*w*) *Cock v. Taylor and Another*, 3 East, 399, per Lord Ellenborough. See also *Scaife v. Tobin*, 3 B. & Adol. 523, as to general average.

(*x*) *Wilson and Others v. Kymer and Others*, 1 M. & S. 157.

(*y*) *Coleman v. Lambert*, 5 Mees. & Wels. p. 502.

(*z*) *Bell and Another v. Kymer and Others*, 5 Taunt. 477; 1 Marsh. 146; 3 Campb. 545.

where there is such an express agreement between the owner and charterer, an indorsee under such circumstances is not liable for freight (*a*). An action grounded upon a supposed implied promise of this kind, was brought against *three* persons, who being in partnership caused goods to be sent from abroad in the name of another person, to which other person the bill of lading was made out. Before the arrival of the goods, the defendants dissolved their partnership, and made an assignment of all their effects to a trustee for the benefit of their creditors, whom the trustee covenanted to indemnify against all deficiency. The trustee then employed *two* of the defendants, as importers of the cargo under him, excluding the *third* defendant; and to these *two* acting under the trustee, the cargo was delivered. It was decided that an implied promise to pay the freight, could not, under these peculiar circumstances be raised against all the *three*, one of them not having actually received the goods, nor being otherwise interested in them, than as a remote cestuique trust, upon the improbable contingency that the partnership effects would be more than sufficient to discharge the partnership debts. And the plaintiff failed in his suit (*b*).

5. In some cases freight is to be paid, or rather an equivalent recompense made to the owners, although the goods have not been delivered at the place of destination, and so the contract for conveyance is not strictly performed. Thus, if part of the cargo be thrown overboard for the necessary preservation of the ship and the remainder of the goods, and the ship afterwards reach the place of destination (*c*), the value of this part is to be answered to the merchant by way of general average, and the value of the freight thereof allowed to the owner in the manner that will be explained hereafter. So if the master be compelled by necessity to sell a part of the cargo for victuals or repairs, the owners must pay to the merchant the price, which the goods would have fetched at the place of destination, and therefore are allowed to charge the merchant with the money, that would have been due, if they had been conveyed thither (*d*).

(*a*) *Moorsom and Another v. Kymer and Others*, 2 M. & S. 303.

(*b*) *Pinder v. Wilks and Two Others*, 5 Taunt. 612; 1 Marsh. 248.

(*c*) *Roccus*, not. 89; French Ordin.

liv. 3, tit. 3; Fret. art. 13.

(*d*) French Ordin. liv. 3, tit. 3; Fret. art. 14; Ordin. of Wisbuy, art. 35 and 69, ante, part 4, chap. 4, p. 327; Code de Com. art. 298.

The *French* Ordinance also directs the payment of freight in another instance, which I do not find provided for in any other Ordinance, or mentioned by any author except with reference to this particular article of the *French* Ordinance, which is as follows: "If it happen that commerce be prohibited with the country, to which a ship is in the course of sailing (*en route*), and the ship be obliged to return with its lading, there shall be due only the freight outward, although the ship be hired out and home" (*e*). This article is also repeated in the Code de Commerce. The commentators on this article agree that the freight outward must be paid, if the ship be freighted outward only (*f*). § And *Valin* says, that nothing can be more just, for this is "*casus fortuitus* proceeding from a *vis-major* against which neither owner nor merchant has warranted, it is quite enough that the merchant should pay freight for the outward voyage already commenced, so as to make division of the loss between him and the master of the ship (*g*).

6. The Courts of Admiralty, where the question of freight comes collaterally before them in the case of captured ships ordered to be restored, will exercise a larger equity than belongs to a Court of law; without assuming to make a new contract between the parties, they presume their consent to such a contract as equitably belongs to a new state of things, not originally within their contemplation. Accordingly, where a ship having been captured at the very mouth of the port to which she was destined, was afterwards re-taken and sold for salvage, but the ship and cargo, upon a suit in the Admiralty, were ordered to be restored, the Court directed a moiety of the freight to be paid, though the merchant insisted that none was due, because the whole voyage had not been performed, while the owner claimed the whole freight, because he had reached the mouth of the river (*h*). §

If in a time of war a neutral vessel carrying goods belonging

(*e*) French Ordin. liv. 3, tit. Fret. art. 16; Code de Com. art. 299.

(*f*) *Valin*, tom. 1, p. 657; *Pothier*, Charter-partie, num. 69.

(*g*) In conformity with this doctrine of the French, it has been decided in the American Courts, that where the ship arrived at the port of destination, but was prohibited by the government from land-

ing her cargo, and making an entry, the freight of the voyage was earned in the same manner as if the cargo were delivered. *Morgan v. North American Insurance Company*, 4 Dalls, Rep. 455.—*Mr. Justice Story's* note, American Ed. 288.

(*h*) *The Friends*, 1 Edw. Ad. Rep. 186.

to the subjects of one of the belligerent powers, be taken by those of the other (in which case the goods are lawful prize, but the ship is to be restored), the captor pays the whole freight, because he represents the enemy, by possessing himself of the enemy's goods *jure belli*; and although the whole freight has not been earned by the completion of the voyage, yet, as a captor, by his act of seizure, has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight (*i*). This, however is to be understood of such goods only, as a neutral vessel may convey by the law of nations, and of a trade ordinarily allowed to the neutral nation by the government, to whose subjects the goods belong. If the goods are contraband according to the law of nations, such as naval stores, &c., no freight is to be paid by the captor (*k*); and this, whether the master know the quality of the goods or not; for, in time of war, he is bound to know the contents of his cargo, and cannot be permitted to aver that he was ignorant of them (*l*); nor is any freight to be paid by the captor, if the ship is employed in bringing the produce of the colony of a belligerent power to the mother country (*m*), or in the coasting trade between one port and another of the same country (*n*), or in carrying the goods, even of neutrals, directly from the mother country to its colony (*o*); or from one hostile nation to the colony of another hostile nation in alliance with it (*p*), if these trades were not, in time of peace, open to the neutral nation, whose ship is so employed; because in all these cases, it is evident that the trade is opened in the time of war merely for the convenience of the belligerent power, and to relieve that power from a part of the difficulties occasioned by the war; and the neutral vessel so employed, thereby furnishes direct assistance to the belligerent power. But as trade from a port of one nation to a port of another is in general open to all countries, freight is to be paid to

(*i*) The Copenhagen, Mening, 1 Rob. Ad. Rep. 289.

(*k*) The Mercurius, Meineke, 1 Rob. Ad. Rep. 288.

(*l*) The Oster Risoer, Jurgenson, 4 Rob. Ad. Rep. 199.

(*m*) The Rebecca, Moor, 2 Rob. Ad. Rep. 101. See also the America, Sherborne, id. vol. 3, p. 36.

(*n*) The Emanuel, Soderstrom, 1 Rob. Ad. Rep. 296, and the Mercurius there cited.

(*o*) The Immanuel, Eysenberg, 2 Rob. Ad. Rep. 186, and the Anne, Lord, id. vol. 3, p. 91, note (*a*), and the Nancy, Joy, id. p. 82.

(*p*) The Rose, Young, 2 Rob. Ad. Rep. 206.

the owners of a neutral ship employed in carrying the goods of an enemy from a port of one nation hostile to the captors, to a port of another nation equally hostile (*g*).

Again, if a ship be taken and retaken, and carried by the recaptors into a port short of the place of destination, and the ship be there restored, before the cargo is restored, either by reason of a delay on the part of the merchant to claim the cargo, or of doubt or litigation upon his right to restitution, the Court of Admiralty does not require the ship to wait the doubtful event of the claim of the cargo, in order to convey it to the place of destination, but gives the owners their whole freight, subject only to the deduction of salvage upon the amount of it (*r*). And this with great justice; for the capture is not imputable to the master; the delay of obtaining restitution of the cargo is imputable to the merchant.

If the ship of an enemy, carrying the goods of a neutral be taken, and the captor conduct the ship and cargo to the place of destination, and so fulfil the contract of the master, the captor is entitled to receive the freight of the goods upon their restitution to the merchant; but he is not entitled to this, if he take the ship to a different port, and do not perform the original voyage (*s*): not even if the proprietor of the cargo afterwards dispose of it at the place to which the ship may be carried (*t*).

7. Freight is the reward which the law entitles a person to recover for bringing goods lawfully upon a legal voyage. If the voyage be illegal by reason of the goods being contraband, or for any other cause, freight cannot be recovered. During the late wars, licenses were frequently granted by the *British* government for voyages and importations which would otherwise have been illegal. The duration of these licenses was usually limited. In general, if the voyage was begun before the expiration of the limited time, though not completed until afterwards, the voyage was considered as legal. But in a case where, in consequence of

(*g*) The *Wilhelmina*, Carlson, 2 Rob. Ad. Rep. 101, in notis.

(*r*) The *Race-horse*, White, 3 Rob. Ad. Rep. 101, and see the cases cited in the note at the end of that report. See also the *Hoffnung*, Raak, 6 Rob. Ad. Rep. 231.

(*s*) The *Fortuna*, Tadsen, 4 Rob. Ad.

Rep. 278, and the case of the *Vreyheid*, and also *Bynkershoek*, Quest. Jur. Pub. lib. 1, c. 13, there cited. This is different from the old rule as laid down in the *Consolato del Mare*, chap. 173.

(*t*) *Vrow Anna Catherina*, Mahts, 6 Rob. Ad. Rep. 269.

an embargo in a *French* port, the voyage was not begun until some time after the expiration of the license, it was held that the freight could not be recovered, although, by an order of council, the freighter was permitted to land the cargo, upon condition of exporting it again immediately, this permission not being considered to legalize the voyage by implication, nor to have the effect of a continuation of the license (*u*).

In another case, in an action brought by the master of a foreign ship for the freight of goods imported into this country, it appeared in evidence that on the ship's arrival with the cargo, the merchant entered her at the Custom House, and a delivery of the cargo in his name was commenced by him; but on the following day the ship and cargo were seized by the revenue officers, on suspicion that the ship was not *Prussian* built, and therefore not capable, under the Navigation Act (*v*), of importing the produce of that country into *England*. The Treasury, on petition presented on behalf of the master and owners, and with the concurrence of the merchant, ordered the ship to be restored, on condition that the cargo should be landed and warehoused for a limited time for exportation only, and on payment of a sum as satisfaction to the seizing officers. This sum the master paid, and the merchant accepted and exported the cargo. It was clear that, supposing the voyage to be illegal, the freight could not be recovered, and the conduct of the master was held to be sufficient proof of the illegality, although the ship had not been condemned (*x*).

8. As it may frequently happen that goods brought in specie to the place of destination, may be so deteriorated during the course of the voyage as to be of no value to the merchant, it is important to consider whether the merchant is bound to pay the freight under such circumstances; or, to state the question more correctly, whether he is bound to receive the goods, or is at liberty to abandon them for the freight. For we have already seen, in the case of an *East India* ship, that the Company (the merchants) were held liable to pay the freight of a quantity of pepper delivered to, and received by them, although greatly damaged by a peril of the sea; and that the owners were not answerable for the expense incurred in endeavouring to remove the injury occasioned

(*u*) *Muller v. Gernon*, 3 Taunt. 394.

(*v*) 12 Car. 2, c. 18, s. 8, since repealed, but see 3 & 4 Wm. 4, c. 54,

printed in the Appendix.

(*x*) *Blanck v. Solly and Another*, 8 Taunt. 89, and 1 B. Mo. 531.

by the salt water (y). And in another case that will be mentioned hereafter, the merchant was held liable to pay the freight of tobacco saved from shipwreck, and accepted by him, although part was so much damaged as to be of no value (z).

Upon this question, as to the right of the merchant to abandon his goods when brought to the place of destination, and by so doing to discharge himself from the freight, different doctrines and opinions have prevailed, and there is no judicial decision in our books; although in some cases between the merchant and his insurer, it has been admitted that the freight was payable, notwithstanding the goods were so much damaged, that their value fell short of its amount (a). But it is necessary to distinguish the causes from which the deterioration may have proceeded. If it have proceeded from the fault of the master or mariners, the merchant is entitled to a compensation, and may recover it by an action at law against the owners or master; but, if he has received the goods, he cannot insist upon the damage as a defence to an action brought against himself for the freight, even although he has offered to return them (b). And in general, the right and true delivery of goods, upon which freight is made payable by the terms of a charter-party or bill of lading, means only a delivery of the entire quantity of chests or bales: if the goods have been damaged by the fault of the master or crew in the voyage, the remedy for the merchant, who has received them, is an action for the damage (c). On the other hand, if the deterioration have proceeded from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of a ship, the merchant must bear the loss, as well as pay the freight; for the master and owners are in no fault,

(y) *Hotham and Others v. East India Company*, Doug. 272, ante, chap. 1 of this part, sect. 15, p. 254.

(z) *Lutwidge and Another v. Grey and Others*, post, sect. 13 of this chapter.

(a) *Boyfield v. Brown*, 2 Stra. 1065, and *Mason v. Skurry*, Park, 160; Marsh. 143.

(b) *Milles and Others v. Bainbridge and Others*, Guildhall, Dec. 20th, 1804, before Lord Ellenborough, Ch. J. His Lordship intimated, that if the merchants had refused to receive the cargo on the

ground of damage so occasioned, the point would admit of some doubt. In such a case, the merchant would derive no benefit whatever from the conveyance, nor would the master have fulfilled his engagement according to the terms of the bill of lading: Quære, therefore, whether the master could oblige the merchant to pay the freight? See *Basten v. Butter*, 7 East, 479.

(c) *Davidson v. Gwynne*, 12 East, 381. See also *Effields v. Davis*, 4 Campb. 119, and 6 Taunt. 65.

nor does their contract contain any insurance or warranty against such an event. And to this point there is a direct authority in the treatise called the *Guidon*. The author, having mentioned several cases of abandonment, as between the merchant and the insurer, goes on thus: "In like manner, the merchant cannot abandon the goods hereinbefore mentioned (viz. fruit, salt, corn, victuals, &c.) to the master of the ship for his freight, if the deterioration has proceeded from natural decay, or from the great diminution of price that takes place at the end of particular seasons, as in figs, grapes, and herrings, after Easter; or by reason of an over-abundant supply of the market, as in corn, wine, or salt, although in salt a different practice formerly prevailed, which is contrary to reason, if the option has not been reserved by an express clause in the charter-party" (*d*).

In the very next article, however, of the treatise, we find this doctrine: "If goods contained in casks, as wine, oil, olives, molasses, and others of the like sort, have leaked to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight, before they are landed. Therefore, masters should take care, when they receive casks, to see that they be well hooped, and in good condition. It is true, that if, by tempest, the casks have been so pressed that they have thrown out their bottoms, have been beaten in, and burst, provided there have been no fault in the stowage, the loss shall be an average against the insurers, the master shall lose his freight" (*e*).

From the words of this article, it appears very clearly, that in the opinion of the author, the merchant might abandon articles of this description, although the leakage were not occasioned by perils of the sea.

In the work of *Molloy* (*f*), however, we find the following clauses: "If freight be taken for one hundred tons of wine, and twenty of them leak out, so that there is not above eight inches from the buge upwards, yet the freight becomes due: one reason is, because from that guage the king becomes entitled to custom; but if they be under eight inches, by some it is conceived to be then in the election of the freighters to fling them up to the master for

(*d*) *Guidon*, chap. 7, art 7, 10.

(*e*) *Guidon*, chap. 7, art. 11.

(*f*) *Book 2*, chap. 4, sect. 14. The

author cites *Boyce v. Cole*, Hil. Term. 26 and 27 Car. 2, in K. B. But I do not find that case reported elsewhere.

freight, and the merchant is discharged. But most conceive otherwise; for if all had leaked out (if there was no fault in the master), there is no reason the ship should lose her freight, for the freight arises from the tonnage taken; and if the leakage was occasioned through the storm, the same perhaps may come into an average. Besides, in *Bourdeaux* (g), the master stows not the goods, but the particular officers appointed for that purpose, *quod nota*. Perhaps a special convention may alter the case."

The *French Ordinance* declares: "That the merchant shall not oblige the master to take for his freight, goods diminished in price, spoilt, or deteriorated, by their own vice, or by peril of the sea" (h). And the very next article is as follows: "If goods put into casks, as wine, oil, honey, or other liquors, have leaked out to such an extent that the casks are empty, or nearly empty, the merchant may abandon them for the freight." *Valin*, in his commentary on this last article, observes, that it is taken from the article of the *Guidon*, which I have just before quoted. He observes, also, that by the *Consolato del Mare*, chap. 202, the contrary is decided; yet, that by another article of the same code, chap. 234, freight is not due for pottery unless it be found entire at the end of the voyage (i); and he considers this article of the Ordinance, to give the right of abandonment to the merchant, in the case of leakage happening as well from the fault of the casks as from the perils of the sea, and to be an exception to the general rule laid down in the article immediately preceding. On the other hand, his countryman, *Pothier*, controverts this opinion, and contends that the article of the ordinance is to be confined to the case of leakage occasioned by peril of the sea; in which case, he considers the real commodity, viz. the contents of the cask, to be absolutely lost, as much as if they had been washed overboard. "This opinion of Monsieur *Valin*," says he, "appears to me to be contrary to principles. It is the fault of the merchant if he has put his goods into bad casks: it is *his* fault if they have leaked

(g) See *Cleirac* on the 11th art. of the *Laws of Oleron*.

(h) *French Ordin.* liv. 3, tit. 3; *Fret*, art. 25 and 26. Those articles are repeated in the *Code de Com.* art. 310.

(i) The sense of this chapter appears not to be correctly stated by the learned commentator. The rule therein laid down

is, that if the merchant stows the pottery he must pay the freight of what is broken; but if the master stows it, he is, at all events, to lose the freight of what is broken; and if there has been any fault in the stowage or earriage, he must also make good the damage.

out, and have not arrived at the place of destination. He, therefore, ought to pay the freight; for, according to the principles of the contract of hiring, the hirer, who by his own act or fault has not enjoyed the thing let to him, ought to pay the hire, as if he had enjoyed it. If the letter, who has been prevented from letting to other persons the part of his vessel occupied by the bad casks, should not be paid the freight, he would suffer for the fault of the hirer, which is unjust" (*k*).

This argument of *Pothier* may show what *ought* to have been established by the ordinance, but it by no means proves that the interpretation given by *Valin*, and which agrees with the terms of the *Guidon*, is not the true interpretation. The rule was probably introduced in early times, to prevent disputes and litigation; and adopted by the framers of the *French* ordinance for the same reason (*l*).

In our *West India* trade, the freight of sugar and molasses is regulated by the weight of the casks at the port of delivery here, which in fact is, in every instance, less than the weight at the time of the shipment, and therefore the loss of freight occasioned by the leakage necessarily falls upon the owners of the ship, by the nature of the contract.

Upon the propriety also of the rule laid down in the preceding article of this Ordinance, namely, that which prohibits abandonment generally, these two learned foreigners have differed in opinion, "It must be agreed," says *Valin*, "that this rule is too rigorous to be compatible with equity. The natural idea, that the mind forms of the agreement for freight, is, that it has for its object that the goods shipped in pursuance of it shall be the only pledge for the freight, and consequently that upon the same goods alone can the payment of the freight be enforced. From whence it follows, that in every case (*en quelque cas que ce soit*) the merchant ought to be quit of the freight by abandoning his goods. This is also the opinion of *Casa Regis*, *Disc.* 22, n. 46, and *Disc.* 23, n. 86 & 87. In the case of *shipwreck* it is decided by the Ordinance, that the freight is not due when the goods are

(*k*) *Traité de Charte-Partie*, num. 60.

(*l*) The Ordinance of Rotterdam on this subject, seems to agree with the general rule of the French Ordinance. It declares, that when the goods are arrived

at the intended place, the merchant is obliged to pay the freight of what happens to be damaged or diminished without any fault of the master or ship's crew. Art. 155; 2 *Magens*, 105.

lost; now, when the goods are so injured by the shipwreck, that he, to whom they belong, cannot derive from them wherewith to pay the freight, is it not the same to him as if they had been wholly lost by the mere act of shipwreck? If then he had not the power of abandoning the goods to discharge himself from the payment of the freight, his condition would be worse than if all had perished without resource, and this is what natural equity will not allow him to suffer." The learned commentator then proceeds to acquaint us, that a practice prevailed in his country, of not compelling the merchant to reclaim shipwrecked goods, and that unless he reclaimed them, the master was never known to obtain the payment of the freight. On the other hand *Pothier* (m), speaking of this article of the Ordinance of his country, says, "This rule, notwithstanding what is said of it by Monsieur *Valin*, is just, and conformable to the principles of the contract of letting to hire. It is sufficient, according to these principles, to make the whole hire due to the letter, that he has wholly performed the obligation, which he contracted, to give to the hirer the enjoyment of the thing let to hire: now the master having transported the goods to their place of destination, it may be truly said, that he has wholly fulfilled his obligation, and that he has given to the merchant the enjoyment of the ship for the use, for which he had let it to him, since this transport was the only use, for which they contracted. If the goods are found greatly damaged and of no value, this is a matter that does not concern the master, because it is by an accident, against which he does not warrant, that they are reduced to this condition. The point of Monsieur *Valin's*, objection," proceeds he, "is, that it is the same thing to the merchant, whether the goods are absolutely lost or become of no value. The answer is, that it is on the side of the master, that we ought to consider whether this is the same thing: now it is evident that this is not the same thing to the master. For when the goods are lost on the way, not having been able to transport them to the place of destination, he has not fulfilled the object of his contract, *munere vehendi functus non est*: and it is for this reason that the freight is not due to him: but when he has transported them, however injured they may be found, he has

(m) *Chartie-Partie*, num. 59.

fulfilled the object of his contract, *munere vehendi functus est*, and by consequence the freight is due to him" (n).

In addition to this answer given by *Pothier* it may be proper also to observe, that the argument of *Valin* seems to prove too much; for if the goods are to be the only security for the freight, and the merchant ought not to pay the freight, if they are not worth the amount of it, the master and owners must lose the freight, if the goods happen from any accident to come to a bad market; which is contrary to all law and reason: and further, that the foundation of the argument does not apply to this country, by the law of which, although the goods are pledged for the freight, yet the merchant also is personally responsible for it.

I have detailed the opinions of these learned foreigners thus at length, because they appear to me to comprise the whole argument on both sides of the question, which, as I have before observed, has not received a judicial decision in this country. It is true indeed, that Lord *Mansfield* in a case, that will be more fully stated hereafter, delivered himself to the following effect: "As to the value of the goods it is nothing to the master, whether the goods are spoiled or not, provided the merchant takes them; it is enough if the master has carried them; for by doing so, he has earned his freight; and the merchant shall be obliged to take all that are saved, or none; he shall not take some, and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandons he is excused freight, and he may abandon all, though they are not all lost." But it is to be observed, that the question of abandonment was not the point in issue in that cause; and in fact in that case the goods had *not* been carried to the place of destination, but the vessel, which was bound for *Lisbon*, had been captured and recaptured, and was carried with the goods into a port in *Devonshire*, where the merchant received them: and therefore if Lord *Mansfield* is to be understood to speak with reference to the case then before him, the sentiments delivered by him on that occasion, cannot be considered as furnishing an au-

(n) *Pothier*, *Charte-Parte*, num. 59. This is also conformable to the *Code de Com.* art. 305, 310. See *Boulay-Paty*, tom. 2, 488. In America also, the better opinion, and the one adopted in the case

of *Griswold v. The New York Insurance Company*, 3 Johns. Rep. 321, is against the right of the owner to abandon the deteriorated goods in discharge of the freight. *Kent's Commentaries*, Edin. Ed. p. 217.

thority for the decision of the question in the case of goods actually carried to the place of destination. It is true also, that in the case of *Lutwidge v. Grey and others*, which will be fully cited for another purpose in the subsequent part of this chapter (*o*), it seems to have been taken for granted, by the counsel on both sides, that the merchants might have abandoned the whole cargo; but in that case the ship was wrecked, and the goods saved at a great expense, at a place short of the port of delivery, and the right of abandonment is spoken of with reference to the situation of the goods at that place. Most certainly the merchant cannot be compelled to accept his goods at any other place than the place of destination: even if the master should pay the salvage, and convey them to that place, the merchant may be allowed to have his option of accepting them or not, loaded with the additional expense of salvage. And accordingly in another case, Lord *Mansfield* said, "The owner of the ship has a lien for freight, but in a total loss, literally so called, no freight is due; in case of a loss, total in its nature, with salvage, the merchant may either take the part saved, or abandon" (*p*). The only point intended to be proposed by me as doubtful, is the right to abandon for the freight alone, at the port of destination: and in point of practice, I have been informed that this right is never claimed in this country.

Bullion and specie have been sometimes sent from abroad to this country by merchants, in ships belonging to his Majesty, for which a remuneration was paid by the merchant. Questions have arisen as to the distribution of this money among officers of the King's ships; but as those questions do not seem to belong to this Treatise, I shall merely refer to the names of the cases in a note (*q*).

9. Having thus considered the cases, in which the entire freight is to be paid according to the agreement, I now proceed to the consideration of those in which *a part* only of the stipulated sum may be claimed. And these are, *first*, when the ship has performed the whole voyage, but has brought a part only of the merchant's goods in safety to the place of destination: And, *secondly*, when the ship has not performed the whole voyage, but the master has delivered the goods to the merchant at a place

(*o*) Sect. 13, p. 392.

(*p*) *Baillie v. Moudigliani*, Park, chap. 2, p. 70.

(*q*) *Montagu v. Janverin*, 3 Taunt.

442; *Brisbane, Knt. v. Dacres, Widow, Executrix of Admiral Dacres*, 5 Taunt. 143; *Warren v. Shirriff*, 5 M. & S. 32.

short of the port of destination. In the case of a general ship, or of a ship chartered for freight to be paid according to the quantity of the goods, there can be no doubt that freight is due for so much as shall be delivered,—the contract in these cases being distinct, or at least divisible in its own nature. But suppose a ship chartered at a specific sum for the voyage, without relation to the quantity of the goods (in which case the contract, as observed by Lord Chancellor *Hardwicke* (r), is more properly a contract for the use of the ship than for the conveyance of the merchandise), should lose part of her cargo by a peril of the sea, but convey the residue to the place of destination; in this case I do not find any authority for apportioning the freight. And it seems to have been the opinion of *Malyne* (s), that nothing would be due; and the case of *Bright v. Cowper*, which will be mentioned hereafter (t), may be considered as an authority in support of that opinion. But probably, if the question should arise again, the determination of it would depend upon the particular words of the charter-party; for without a very precise agreement for that purpose, it seems hard that the owners should lose the whole benefit of the voyage, where the object of it has been in part performed, and no blame is imputable to them.

10. The apportionment of freight usually happens when the ship, by reason of any disaster, goes into a port short of the place of destination, and is unable to prosecute and complete the voyage. In this case we have already seen that the master may, if he will and can do so, hire another ship to convey the goods, and so entitle himself to his whole freight; but if he is unable, or if he declines to do this, and the goods are there received by the merchant, the general rule of the ancient maritime law is, that freight shall be paid according to the proportion of the voyage performed, *pro rata itineris peracti* (u).

Some writers (v) have endeavoured to trace this rule to the *Digest of Justinian*, but the passages referred to by them do not appear to contain such a regulation. The rule, however, is, without doubt, extremely ancient. It is to be found in the collection

(r) In the case of *Paul v. Birch*, 2 Atk. 621, ante, chap. 1 of this part, sect. 7, p. 219.

(s) *Malyne's Lex. Mercat.* p. 100.

(t) Sect. 17 of this chapter, p. 401.

(u) The Ordinance of Rotterdam dif-

fers in this respect from the general rule; for it allows the merchant to take his goods, paying a reasonable portion of the freight in case the ship may be repaired in a short time. Art. 147; 2 *Magens*, 104.

(v) *Roccus*, not. 81

called the *Rhodian Laws* (*w*), but which collection is now generally agreed to be of a later date than the time of *Justinian* (*x*); and also in the *Consolato del Mare* (*y*). The rule, as laid down in the laws of *Oleron* (*z*), is to the following effect. If a ship depart with a cargo from *Bordeaux*, or other place, and it happens that the ship is disabled, and as much of the cargo is saved as possible, the merchants and master enter into a great debate, and the merchants demand to have their goods of the master, they may have them, upon paying freight for so much of the voyage as the ship has advanced, rateably and in proportion, if the master pleases; but if the master will, he may repair his ship, if he can do it speedily; and if not, he may hire another ship to complete the voyage, and shall have his freight of the goods, to be reckoned according to their proportion to the whole cargo; and the goods shall pay the costs of their salvage. The rule is also to be found in *Roccus* (*a*), (who cites several more ancient authors in support of it), and all the subsequent writers on maritime law; and is adopted in most of the foreign ordinances, particularly in the *French* ordinance (*b*); which declares, that "The master shall be paid the freight of goods saved from shipwreck, if he conveys them to the place of destination. If he cannot find a vessel to convey the goods saved, he shall be paid freight in proportion only to the voyage performed." So, "if the master be obliged to repair his vessel during the voyage, the merchant must wait, or pay the entire freight; and in case the vessel cannot be repaired, the master shall be obliged forthwith to hire another; and if he cannot find one, he shall be paid freight in the proportion only of what the voyage shall be advanced" (*c*). These obligatory words are said to mean only that the master must hire another ship *if he will gain his whole freight* (*d*). But in the case of interdiction of commerce and return of the ship, this ordinance prescribes a dif-

(*w*) Per Lord Mansfield in *Luke v. Lyde*, 2 Burr. 889.

(*x*) Schomberg's Dissertation on these laws. The only rule that can be distinctly and authoritatively traced to the institutions of Rhodes, is the law de Jac-tu, quoted and adopted in the Dig. 14, 2, 1. See the ninth chapter of this part, sect. 2.

(*y*) Per Lord Mansfield, in *Luke v. Lyde*, 2 Burr. 889, alluding probably to

chap. 193.

(*z*) Art. 4, and see Ordin. of Wisbuy, art. 16, 37.

(*a*) Loc. sup. cit.

(*b*) Liv. 3, tit. 3; Fret. art. 21 and 22; and Code de Com. art. 303, as to payment to the place of shipwreck.

(*c*) Same title, art. 11, and Code de Com. art. 296.

(*d*) Valin on the article.

ferent rule, which I have before noticed : " If there happen a prohibition of commerce with the country to which the ship is sailing, and the master be obliged to return with his cargo, the outward freight alone shall be due to the master, although the ship be freighted out and home" (e).

11. With regard to capture and ransom, the author of the *Guidon*, speaking of the case where the goods only are taken by pirates and the ship discharged, and the goods are afterwards ransomed, says, that " If the master will not contribute to the ransom, he shall lose his whole freight ; but if he contributes, he shall be paid freight as far as the place of the capture, as well in the case of affreightment by charter-party as otherwise ; and if he furnishes another ship, to relade the goods, he shall be paid his whole freight" (f). Upon this subject the *French Ordinance* provides, " that if the ship and goods are ransomed, the master shall be paid his freight as far as the place of capture,—even his whole freight, if he conveys the goods to the place of destination, he contributing to the ransom" (g). Although ransom is now prohibited by the law of *England*, yet this doctrine may apply to the case of capture and recapture ; and accordingly, in an action brought by a seaman for his wages, in the case of a ship taken and retaken, and which reached the port of destination (h), Lord *Eldon*, before whom the cause was tried, held that the wages were payable, because, said his Lordship, " the ship on her arrival was entitled to freight" (i).

12. Upon this subject of the apportionment of freight, *Malynes* says, " If the ship in her voyage become unable without the master's fault, or that the master or ship be arrested by some authority of magistrates in her way, the master may either mend his ship or freight another. But in case the merchant agree not thereunto, then the master shall at least recover his freight, so far as he hath deserved it" (k). The same author also mentions the following case : A merchant took a ship to freight, and put in the master and mariners, and victualled the ship at his own expense, and by a charter-party engaged to pay the owner for the use of

(e) Same title, art. 15, and Code de Com. art. 299.

(f) *Guidon*, chap. 6, art. 7.

(g) Liv. 3, tit. 3 ; Fret. art. 19, and Code de Com. art. 303.

(h) *Bergstrom v. Mills*, Westminster Sit. in Mich. Term, 40 Geo. 3 ; 3 Esp. N. P. C. 36.

(i) See before, sect. 1 of this chapter.

(k) *Malynes*, p. 98.

ship and furniture 20*l.* every month, at her return into the river *Thames*. The merchant laded the ship for the *Streights*, and to go from port to port, and to several places with merchandize; and after about two years, the ship, having taken in a cargo at *Barbary*, was, on her return to *London*, cast away by a tempest near *Dover*; and the goods were saved. The merchant refused to pay the freight, because the ship did not arrive in the river *Thames*, according to the words of the charter-party. "Herein," says the author, "the owner was much wronged, for the money is due monthly, and the place was named only to signify the time when the money due, was to be paid;" but he does not inform us whether the question was ever brought before a court of justice, or whether or no the merchant finally paid any part of the freight (*l*). His opinion, however, is confirmed by the following case.

The ship *Lord Duncan* was let to freight for twelve calendar months certain, from the 24th *September*, 1806, and from thence for such longer period, if any, as the merchants should detain her; the ship to be under their entire control, so far as related to all orders for sailing, destination, and delay. The merchants covenanted to pay for the hire and service of the ship for the twelve months, and such longer time as they should keep her, the freight and rate following, viz. twenty-four shillings per calendar month per ton, being 1119*l.* 12*s.* per month, commencing from the before-mentioned day, and ending *when the ship should be returned to the river THAMES, and thereby the freighters be declared to be discharged*; it being understood that they should not be at liberty to discharge the ship at any other place but within the port of *London*; the freight to be paid in the proportions, and at the periods following; viz. two months at the execution of the charter-party; two months more at the end of six calendar months from the said 24th of *September*; two months more at the end of ten calendar months; two months more at the end of fourteen calendar months, should the ship be so long employed; and in like manner two months more at the end of every succeeding two calendar months *until the ship should be discharged, and immediately upon such discharge* the balance to be paid. The ship was taken into the employ of the merchants, and *between ten and twelve months* from

(*l*) *Malync*, p. 101.

the said 24th of *September*, was destroyed at *Saint Domingo* by an accidental fire. The merchants contended that the right to the portions of freight depended upon the safety of the ship at the particular times at which they were made payable, so that the loss of the ship at the time before mentioned confined the claim of the owner to six months, for which period he had been paid. But the Court of King's Bench decided that the times fixed for the actual payment were to be considered only as postponing for the merchant's convenience the actual payment of sums then due, to a future period; not as creating a contingency whether they should ever be paid at all; and that each month's freight was earned and became completely due at the end of each month, the actual payment only being postponed (*m*). The distinctions between this case and that of *Smith v. Wilson* (which will be mentioned hereafter) (*n*), both as to the terms of the contract and the subsequent events, will be obvious to the reader.

13. This rule of maritime law, which directs the payment of freight according to the portion of the voyage performed *pro rata itineris peracti*, is open to much observation, and to many difficulties. I have been able to collect upon it only the following decisions of *English* courts.

Lutwidge, the owner of a ship called the *Wharton*, of *Whitehaven*, let his ship by a charter-party to *Archibald Grey* and others, merchants at *Glasgow*, for a voyage from *Glasgow* to *Maryland* or *Virginia*, and back from thence to *Glasgow*, and was to receive freight from them for the homeward cargo only, at the rate of 8*l.* 12*s.* per ton of tobacco, computing four hogsheads to the ton; one-half to be paid immediately after the ship's discharge at *Glasgow*, and the other half within six months after such discharge. The ship sailed to *Virginia*, and there delivered her outward cargo, and took on board from the merchant's factor a cargo of tobacco, consisting of one hundred and ninety-nine hogsheads, part of which was their property; the residue belonged to other persons, and was put on board by the factor to complete the lading, in pursuance of directions given to him for that purpose by his principals, in case the outward cargo should not enable him to purchase a full lading on their account. *Grey & Co.*

(*m*) *Havelock v. Goddes and Others*,
10 East, 555. See before, chap. 1 of
this part, sect. 10, p. 236.

(*n*) See the last section of this chap-
ter.

insured their part of the cargo with persons living at *Bristol*; the other part was not insured. On the return homeward, the ship was unfortunately cast away at *Youghall*, in *Ireland*, which is within a very short distance of *Glasgow*, and part of the cargo, to the amount of one hundred and sixty-three hogsheads, was saved by the assistance of the officers of the customs at *Youghall*, and deposited in the Custom-house there. *Lutwidge*, the owner, as soon as he knew of the misfortune, informed *Grey & Co.* of it, and told them he should provide another ship to transport the tobacco which was saved. *Grey & Co.* abandoned their part of the cargo to their insurers, and indorsed over the bills of lading to them. *Lutwidge* provided another ship at *Youghall*, but the insurers took the part of the cargo abandoned to them, and conveyed it to *Bristol*. The agent of the proprietors of the other part of the cargo was willing to have laded it on board the ship thus provided, if the master thereof would sign bills of lading to deliver it at *Glasgow*, in conformity with the original charter-party; but the master refused to give such bills of lading, or to oblige himself to deliver it at *Glasgow*, offering only to give receipts obliging himself to deliver it in *Great Britain*. And the agent, suspecting that he meant to take it to *Whitehaven*, and not to *Glasgow*, refused to deliver it to him upon those terms, and sent it by another vessel to *Glasgow*, where several hogsheads were found so much damaged, that they were not entered at the Custom-house, but burned at the king's scales there. *Lutwidge* brought an action against *Grey & others* for his freight, according to the charter-party, in the Court of Admiralty in *Scotland*. On their part it was insisted, that the contract of affreightment was dissolved by the shipwreck, and that there remained only a demand in equity for freight; that the demand could not be made against *them*, who had not taken the goods into their possession, but must be made for part against the insurers at *Bristol*, and for the residue against the proprietors of that residue; that this demand could only be in proportion to the value of the goods saved, after deduction of salvage and charges; and that, at all events, it could only be for the proportion of the voyage to *Youghall*, because the master of the ship refused to sign bills of lading, and engage to deliver the tobacco at *Glasgow*. The Judge of the Court of Admiralty decreed, that the full freight was due from *Grey & Co.* for the part of the cargo saved, but none for the part lost, and that the full freight was due, although the goods were

not carried to *Glasgow*, because *Lutwidge* had another ship ready to transport them thither, and there was no occasion for any new bills of lading while the former bills of lading subsisted. From this judgment *Grey & Co.* appealed to the Lords of Session in *Scotland*, who by their interlocutor decreed, "That the contract of affreightment was dissolved by the total loss of the ship, albeit some of the shipwrecked goods were saved out of the shipwreck; and found that the freighters indorsing the bills of lading to the insurers, did not subject the freighters to any freight for the goods recovered by the insurers, but found the merchants liable to the freight *pro rata itineris* of such of the goods as were brought to *Glasgow*, notwithstanding some of the tobacco was found damaged, and burned there." This decree or interlocutor was, upon the petition of *Lutwidge*, reviewed by the Lords of Session, but affirmed by them. Hereupon *Lutwidge* appealed to the highest tribunal of the country, the *British House of Lords*. The House of Lords reversed the decree or interlocutor of the Lords of Session complained of by the appellant, and the affirmance of that interlocutor; and declared, that the respondents, *Grey & others*, were liable for the full freight of such of the goods as were given up to the insurers, and for the freight *pro rata itineris* of such of the goods as were brought to *Glasgow*, notwithstanding some of the tobacco were found damaged, and burned there" (c).

The next case on this subject was decided in the Court of King's Bench, and occurred soon after Lord *Mansfield* presided in that Court. The cause had been tried before his lordship in the country, and he appears to have paid particular attention to the decision. "I was desirous," said his lordship, "to have the point reserved for the opinion of the Court, in order to settle it more deliberately, solemnly and notoriously; as it is of so extensive a nature, and especially as the maritime law is not the law of a particular country, but the general law of nations: *non erit alia lex Romæ, alia Athenis: alia nunc, alia posthac; sed et apud omnes gentes et omni tempore una eademque lex obtinebit.*"

(c) *Lutwidge and Another v. Grey and Others*, determined in the House of Lords, 23rd February, 1733. The account here given is taken from the printed cases delivered by both parties to the House of Lords. The judgment of the

House of Lords will be found in the printed Journals of the year, p. 356. The case is cited in the case of *Luke v. Lyde*, both at the bar and by Lord *Mansfield*, who was one of the counsel for the appellants.

The facts of the case were these : *Lyde* shipped a cargo of 1,501 quintals of fish at *Newfoundland*, on board the ship *Sarah*, belonging to *Luke & others*, to be carried to *Lisbon* : the freight was to be at the rate of *two shillings* per quintal. The price of the cargo at *Newfoundland* was *ten shillings and sixpence* per quintal. *Luke & others* also had on board a quantity of fish, their own property. The ship set sail on the 27th *November*, 1756, and having proceeded *seventeen* days on her voyage, was taken, on the 14th of *December*, by a *French* ship, within *four* days' sail of *Lisbon*, but retaken on the 17th of *December*, by an *English* privateer, and brought, on the 29th, into the port of *Biddeford*, in *Devonshire*. The *French* ship took out the master and all the crew, except one man and a boy. *Lyde* took his goods of the recaptors, and paid *five shillings* per quintal salvage, the value of the fish being then estimated at *ten shillings* per quintal. The fish could not be sold at all at *Biddeford*, nor at any other port in *England*, for more than *ten shillings* per quintal, clear of charges and expenses ; and it was supposed by every person that the fish would be disposed of to the greatest advantage at *Bilboa*, in *Spain*, to which place *Lyde* sent it without delay ; but it fetched there only *five shillings and sixpence* per quintal, clear of freight and expenses, being little more than one-third of the prime cost and salvage. The freight from *Biddeford* to *Lisbon* was higher than from *Newfoundland* to *Lisbon*. The owners, *Luke & others*, abandoned the ship to their insurers, and never offered to convey the goods to *Lisbon*, nor were ever required to do so by *Lyde*, the merchant. In an action brought by the owners, *Luke & others*, for freight, the Court decided that they should recover freight as for half the quantity of the cargo shipped, considering the other half to be absolutely lost by the expense of salvage, and in the proportion of *seventeen* days, during which the ship had proceeded on the voyage, to *twenty-one* days, within which the voyage would have been completed, if the capture had not happened, that is 60*l.* 14*s.*, being $\frac{1}{2}$ of 75*l.*, the half of 150*l.* And Lord *Mansfield* said, " If a freighted ship becomes accidentally disabled on its voyage, without the fault of the master, the master has his option of two things ; either to refit it, (if that can be done within convenient time) or to hire another ship to carry the goods to the port of delivery. If the merchant disagrees to this, and will not let him do so, the master will be entitled to the whole freight of the full voyage ; and so it was de-

terminated in the House of Lords, in the case of *Lutwidge & How v. Grey et al.* As to the value of the goods, it is nothing to the master of the ship, whether the goods are spoiled or not, provided the freighter takes them; it is enough if the master has carried them, for by doing so, he has earned his freight, and the merchant shall be obliged to take all that are saved, or none; he shall not take some and abandon the rest, and so pick and choose what he likes, taking that which is not damaged, and leaving that which is spoiled or damaged. If he abandon *all*, he is excused freight; and he may abandon *all*, though they are not *all* lost. (I call the freighter the merchant, and the other the master, for the clearer distinction.) Now, here is a capture without any fault of the master, and then a recapture; *the merchant does not abandon, but takes the goods, and does not require the master to carry them to Lisbon, the port of delivery.* Indeed, the master could not carry them in the same ship, for it was disabled, and was itself abandoned to the insurers of it; and he would not desire to find another, because the freight was higher from *Biddeford* to *Lisbon*, than from *Newfoundland* to *Lisbon*. There can be no doubt but that *some* freight is due; for the goods were not abandoned by the freighter, but received by him of the recaptor. The question will be, *what* freight? The answer is, a *rateable* freight; *i. e. pro rata itineris.*

“ If the master has his election to provide another ship to carry the goods to the port of delivery, and the merchant does not even desire him to do so, the master is still entitled to a proportion, *pro rata*, of the former part of the voyage. I take the proportion of the salvage here, to be half of the whole cargo upon the state of the case as here agreed upon. And it is reasonable that the half here paid to the recaptor should be considered as *lost*. For the recaptor was not obliged to agree to a valuation, but he might have had the goods actually sold, if he had so pleased, and taken half the produce, and therefore the half of them are as much lost as if they remained in the enemy's hands. So that half of the goods must be considered as *lost*, and half as *saved*. Here the master had come *seventeen* days of his voyage, and was within *four* days of the destined port when the accident happened. Therefore, he ought to be paid his full freight for $\frac{1}{2}$ parts of the full voyage, for that half of the cargo which was saved.” His lordship then proceeds to cite most of the authorities that I have already quoted on this subject, and concludes thus: “ It is quite

immaterial what the merchant made of the goods afterwards, for the master hath nothing at all to do with the goodness or badness of the market; nor, indeed, can that be properly known, till after the freight is paid: for the master is not bound to deliver the goods till after he is paid his freight. No sort of notice was taken of that matter in the case of *Lutwidge & How v. Grey*, in the House of Lords; and yet there the tobacco was damaged, very greatly, even so much that a great part of it was burnt at the scales at *Glasgow*" (p).

In a subsequent case, a ship sailed with goods from *Nevis* for *Bristol*, but on the voyage was taken and carried into *France*, and condemned there. On appeal the sentence of condemnation was reversed, and restitution awarded, but before that time the ship and cargo were sold. The merchants received the price of the goods, and paid freight to the master *pro ratâ itineris*: and, having caused the goods to be insured before the commencement of the voyage, brought an action against the insurers to recover from them, the freight so paid to the master. The Court held that this payment could not be recovered upon this insurance. But Lord *Mansfield* said, "As between the owners of the ship and cargo in case of a total loss no freight is due, but as between them no loss is total, where part of the property is saved, and the merchant takes it to his own use. In this case the value of the goods was restored in money, which is the same as the goods, and therefore freight was certainly due *pro ratâ itineris*" (q).

So where a ship under a neutral flag, and with neutral papers, was in time of war driven into a *British* port by stress of weather, and seized together with the cargo, and libelled in the Court of Admiralty for condemnation, on account of various circumstances, which led to a suspicion that both ship and cargo were the real property of the enemy: and the neutrality of the cargo being proved before proof of the neutrality of the ship arrived, the cargo was restored during the detention of the ship, and part thereof was sent in other vessels, to the place of destination, and the residue conveyed to *London*. Lord *Stowell*, after having decreed the restoration of the ship, decreed also that the mer-

(p) *Luke and Another v. Lyde*, 2 Burr. 882, and 1 Black. Rep. 190.

(q) *Baillis v. Moudigliani*, Park, chap. 2, p. 70.

chants should pay freight for their goods for the portion of the voyage performed (r).

On the other hand, in the case of a *Swedish* ship, which being chartered to go from *Plymouth* to *Radstow*, (a very small distance), there to take a cargo of pilchards for *Venice*, sailed to *Radstow*, and took in the cargo, and proceeded a few days on the voyage; but meeting with bad weather and becoming leaky, returned to *Falmouth*, and was there stopped by an embargo imposed on the vessels of *Sweden*, in consequence whereof the cargo was taken out and restored to the merchants, who were *British* subjects; the learned judge of the Court of Admiralty decreed no freight was due; but held that if any expenses had been incurred by the ship on account of the cargo, they must be paid (s).

14. Neither of the authors by whom the preceding case of *Luke v. Lyde* is reported, have mentioned the form of action adopted by the plaintiff *Luke* to enforce his demand. In a case since decided in the Court of King's Bench, it was understood to have been an action for freight for the carriage of goods generally, and not an action founded on the original contract for the conveyance of the goods from *Newfoundland* to *Lisbon*. And so it really was (t). The case, to which I at present allude, is that of *Cook v. Jennings* (u), which was an action of covenant on a charter-party of affreightment dated 2nd August 1796, by which the plaintiff let his ship the *Resolution* to the defendant, to freight from *Liverpool* to *Wyburgh*, and back to *Liverpool*, and agreed that the master should take on board a cargo of salt for *Wyburgh*, and after delivering the same there, should take on board a cargo of deals; in consideration of which the defendant agreed to pay to the plaintiff, "in full for the freight and hire of the ship for the said voyage, at and after the rate of 7*l.* per standard hundred for deals delivered at *Liverpool*, &c. the freight to be paid one-fourth in cash at her arrival, and the remainder by an acceptance

(r) *The Copenhagen*, Mening, 1 Rob. Ad. Rep. 289.

(s) *The Isabella Jacobina*, Sovergren, 4 Rob. Ad. Rep. 77.

(t) I have examined the record, and find it to be so. The issue is of Trin. Term, 32 and 33 Geo. 2, Roll. 379. The declaration is for the freight of goods

carried in the plaintiff's ship by sea, without mentioning from or to what place.

(u) *Cook v. Jennings*, 7 Term Rep. K. B. 381. The case came before the Court on a demurrer to the plea, which alleged that no part of the deals was delivered at *Liverpool* according to the charter-party.

on *London* at four months' date." The plaintiff in support of his action alleged, that the ship, after carrying the cargo of salt to *Wyburgh*, took on board there a cargo of deals, &c. and proceeded on her voyage for and towards *Liverpool*, &c.; and whilst the ship was so proceeding, and after she had performed a great part of her voyage, but before her arrival at *Liverpool*, the ship was, by the force and violence of the winds and waves, wrecked and cast upon the shore, and thereby became incapable of proceeding any further on the voyage, by reason whereof it became necessary to put the cargo of deals on shore for the preservation thereof, "which said cargo so unladed the defendant accepted and received into his hands and possession, and sold and disposed of the same to his own use, whereby he became liable to pay to the plaintiff a proportionable part of the said freight and hire of the ship for the carriage of the said cargo of deals, for such part of the voyage from *Wyburgh* to *Liverpool* as the ship performed;" which proportionable part amounted to the sum of 800*l.*; and for the recovery of that sum the action was brought.

These facts were admitted to be true, and it was admitted that no part of the cargo was conveyed to *Liverpool*. The plaintiff did not pretend that he had offered to convey the deals thither, nor did the defendant assert that he had required him to do so. The Court of King's Bench decided that the plaintiff could recover nothing in the present action. Lord *Kenyon* said, "We are called upon to decide in this action according to the rules of law, on a contract between these parties, which was made in the most solemn manner by a deed under seal; though indeed I do not know that it would have made any difference, if the question had arisen on a precise formal contract not under seal. By the terms of this agreement the defendant engaged to pay so much on delivery of the goods at *Liverpool*, one-fourth in cash on her arrival, and the remainder by an acceptance at four months: but the goods never arrived; then at what time were those bills to be dated? We do not sit here to make, but to enforce contracts: and the question put to us is, whether the freight is to be paid under this contract, though the ship never arrived, but was lost before her arrival at *Liverpool*? upon which I cannot bring my mind to doubt. The case of *Luke v. Lyde* is very distinguishable from the present, that being the case of a general assumpsit for the freight of goods; in which Lord *Mansfield* states the marine law on this subject. But what has the case of an implied

contract to do with an express contract? Lord *Coke* says, *expressum facit cessare tacitum*. Here the parties are bound by a precise agreement. Then it is suggested, that we ought not to give effect to this contract, because it is unreasonable: but we are to decide according to the contract of the parties; and the law says, that if *A.* covenant to enfeoff *B.*, *A.* is not released from his covenant, though *B.* will not accept livery of seisin, unless the act be frustrated by the act of the covenantee. It is not necessary now to determine whether or not the plaintiff might not have brought an action of assumpsit; it will be time enough to decide that case, whenever the question arises. But here the question is, whether or not he can enforce payment of the money under this contract, not having carried the goods to *Liverpool*, and the defendant having only undertaken to pay on their delivery at *Liverpool*; in answer to this action the defendant has a right to say, *non hæc in fœdera veni*."

The other judges concurred in the same opinion; Mr. Justice *Grose* cited the case of *Bright v. Cowper*, as a direct authority against the plaintiff.

Mr. Justice *Lawrence* said: "I agree with the plaintiff's counsel, that whether the contract be by parol or under seal, the operation of the law on it is equally the same. When a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another; and having performed the voyage, he is then entitled to his freight: but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro ratâ* unless under a new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties: but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at *Liverpool*. That event has not happened, and therefore the plaintiff cannot recover in this form of action. I presume the learned judge, in thus speaking of the duty of the master, must be understood to have expressed himself with a view to the master's claim of his whole freight.

The next case upon this subject was an action brought for the recovery of freight or passage money against a person, who had embarked with his family and luggage in a ship bound from *Demerara* to *Flushing*, at a stipulated price for the voyage.

The ship was taken by a *British* cruizer at the entrance of the Channel, and was brought into *Plymouth*, and libelled in the Court of Admiralty as prize. The defendant and his family were set at liberty at *Plymouth*, and the luggage restored. The case of *Luke v. Lyde* was cited in support of the master's claim. The action was brought pending the proceedings in the Court of Admiralty, and upon that ground was decided against the master, because possibly the Court of Admiralty might order the defendant to pay to the captors; but the observations made by Mr. Justice *Le Blanc* upon the subject now under consideration deserve great attention. "It is not necessary," said the learned judge, "to give any opinion upon the case of *Luke v. Lyde*, for as this case now stands, the plaintiff cannot at any rate recover in this action. Supposing this were a case for the freight of goods only, which had been stopped in the course of their voyage and carried to another place; then by assimilating it to the case of *Luke v. Lyde*, the plaintiff contends that he is entitled to recover *pro rata* for the freight, not on the ground of the original contract, but by reference to the marine law, on which the Courts have shaped a course to recover for a benefit to the defendant, which made part of the original contract. That was the footing on which the case of *Luke v. Lyde* was put; that though the master could not recover on the original contract, which was not performed; yet that he might recover on an implied assumpsit for a benefit already conferred on the defendant; which in that case was implied from the acceptance of the goods by the defendant at the port into which they were carried" (x).

17. The case of *Bright v. Cowper* (y), cited by Mr. Justice *Grose*, happened in the time of *James the First*, at a period when mercantile causes or contracts had very seldom occupied the attention of *English* courts of justice. The report of it is in the following words: "Action of covenant brought upon a covenant made by the merchant with a master of a ship, *videlicet*, that if he would bring his freight to such a port, then he would pay him such a sum, and shows that part of the goods were taken away by pirates, and that the residue of the goods were brought to the place appointed, and there unladed, and that the merchant hath not paid, and so the covenant broken; and the question was, whether the merchant should pay the money agreed for, since all

(x) *Molloy v. Backer*, 5 East, 316.

(y) 1 Brownlow, 21.

the merchandizes were not brought to the place appointed? and the Court was of opinion, that he ought not to pay the money, because the agreement was not by him performed." Upon reading this report, it is not quite clear what was the real question before the Court; but it seems that the plaintiff claimed his *whole* freight, to which it might very properly be decided that he was not entitled, as he had not performed the *whole* contract. If he claimed a part only of the freight, and was held by the Court not to be entitled to any thing, it may be, that by the particular terms of the contract, the payment of freight was made to depend upon the delivery of the entire cargo. *Molloy*, immediately after the citation of this case, adds the following observation: "But by the civil law this is *vis major*, or *casus fortuitus*, there being no default in the master or his mariners, and the same is a danger or peril of the sea, which, if not in naval agreements expressed, yet is naturally implied; for most certain had those goods, which the pirates carried away, in stress of weather, *navis levandæ causa* been thrown overboard, the same would not have made a disability as to the receipt of the sum agreed on: for by both the common law and the law marine, the act of God, or that of an enemy, shall no ways work a wrong in actions private" (z).

Upon a review of these cases it will appear, that considering the subject with regard to the proceedings in the courts of common law of *England*, the right to freight *pro ratâ itineris* must arise out of some new contract between the master and the merchant, either expressly made by them, or to be inferred from their conduct. The right cannot possibly exist when the original contract has been performed, for then the master has another and more beneficial claim. Where an inference is to be drawn from the conduct of the parties, the rule of the maritime law will probably have great weight. But admitting this, still its true import and meaning may be questionable. In the case of *Luke v. Lyde*, it appears to have been adopted by Lord Mansfield *ad litteram*; to have been treated rather as a positive rule, laid down to prevent questions and discussions, than as a general principle of jurisprudence, to be moulded and modified according to the cir-

(z) *Molloy*, book 2, chap. 4, sect. 7. There is a case in 2 Mo. 397, and 8 Taunt. 354, in which a question was raised respecting *pro ratâ* freight, but as

the decision turned wholly on the construction of a particular agreement, it has not been noticed in this Treatise.

cumstances of each particular case that may fall within its operation. For it is obvious that the rule was there considered by his Lordship as a rule of space or time, and that the portion of the voyage performed was, in his judgment, the portion of sea that the ship had traversed, or the portion of time that had been expended in the voyage, compared with what might be required for its completion. Perhaps the measure of time was considered to furnish the measure of space, as distance is sometimes computed by the number of days' journey. But it is obvious that such a mode of computation is very imperfect in its application to a journey by sea, in which the advance depends so much upon the state of the elements. It is obvious also, that, considered with reference to the interests of the merchant, the measure of time or space cannot reasonably be admitted as a general rule; for if a ship arrive within one day's sail of the place of destination, and be driven or carried back from thence to the place of lading, the merchant cannot possibly be benefited by this ineffectual advance. If the ship put into a port short of the place of destination, the benefit of the merchant must depend upon many contingencies, upon the opportunity of sale there, and the means of further transport. In the case of *Luke v. Lyde*, the carriage of goods from the port to which the ship was taken to the place of destination, was higher than from the port of lading to that place. The rule was manifestly considered as applicable to the labour bestowed by the master, and not to the benefit received by the merchant; to the service performed, and not to the advantage derived from its performance. Whether the rule, so interpreted, be conformable to the principles of justice or equity, may well be questioned. The meaning and interpretation of the rule became the subject of discussion in the Court of King's Bench in a more recent case, which I shall now mention, but under circumstances which did not lead to a decision on this point.

The ship *Young Nicholas* was chartered for a voyage from *Falmouth* to *Honduras*, to fetch 'a cargo of mahogany and other wood from thence to *London*: the freight to be calculated upon the quantity of wood, and to be paid, one-third upon a right and true delivery of the cargo, and two-thirds by a bill at three months date from such delivery. The adventure proved highly unfortunate. The ship took in her cargo, but encountered a storm, which compelled her to put into *Savannah*, in *Georgia*, to repair, and a part of the cargo was there sold to defray the ex-

pense. She sailed again from *Savannah*, but was taken by a *French* privateer, and carried towards *Guadaloupe*. She was retaken near that island by a *British* sloop of war, and sent to *St. Kitt's*, and was there driven on shore by a hurricane, and wrecked. The remainder of the cargo was saved, and was afterwards sold at the instance of the master, without communication with the merchant, and the proceeds were remitted to the owner of the ship. The merchant sued the owner for the recovery of this money: the owner insisted that he was entitled to retain the whole or some part in respect of freight. The master had acted to the best of his judgment, but the sale was held unwarrantable (a). The form of the action was such as to admit of the owner's claim, if it could be substantiated; and in argument before the Court, it was questioned, whether any freight was payable in respect of the goods sold at *St. Kitt's*; and if any, then, whether such freight were to be calculated on the portion of the voyage performed in point of time or distance, or only on the proportionate diminution of expense between the rate of freight from *St. Kitt's* to *London*, and from *Honduras* to *London*; and whether the freight should be allowed on the quantity of goods sold, or in the proportion which the clear produce of the sale bore, either to the prime cost, or to the value in *London*. But the Court being of opinion that the owner was not entitled in this case to any freight *pro rata*, the questions as to the mode of computation remained undecided. The distinction between one of the principal facts of this case and of the case of *Baillie v. Moudigliani*, which I have before mentioned, is obvious (b). In this case the sale of the goods took place at the unauthorized instance of the master of the ship; in the other it took place under the authority of a Court of Prize, by whose acts the final transport of the goods to the place of destination had been prevented. And in delivering the judgment of the Court in the present case, Lord *Ellenborough*, after commenting very forcibly on this distinction, proceeded as follows: "The principles which appear to govern the present action are these: The shipowners undertake that they will carry the goods to the place of destination, unless prevented by the dangers of the seas, or other unavoidable casualties; and the freighter undertakes that

(a) See before, part 1, chap. sect. 2, p. 1 to 13, and chap. 3 of this part, p. 321.

(b) See before, sect. 13 of this chapter, p. 397.

if the goods be delivered at the place of their destination, he will pay the stipulated freight; but it was only in that event, viz. of their delivery at the place of destination, that he, the freighter, engages to pay any thing. If the ship be disabled from completing her voyage, the shipowner may still entitle himself to the whole freight, by forwarding the goods by some other means to the place of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding them be dispensed with, *or unless there be some new bargain upon this subject*. If the shipowner will not forward them, the freighter is entitled to them without paying any thing. One party, therefore, if he forward them, or be prevented or discharged from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward them, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the shipowner has no right to withhold the possession from him, unless he has either earned his freight or is going on to earn it. If no freight be earned, and he decline proceeding to earn any, the freighter has a right to the possession. The captain's conduct in obtaining an order for selling the goods, and selling them accordingly, which was unnecessary, and which disabled him from forwarding the goods, was in effect declining to proceed to earn any freight, and therefore entitled the plaintiff to the entire produce of his goods, without any allowance for freight" (c).

In this case of *Hunter v. Prinsep*, it will be observed, that the act of the master had deprived the merchant of his election to accept the goods at the place of the disaster, or require them to be carried to the port of destination, and that there was nothing in the conduct of the merchant from which a new contract could be inferred. In the case which I am now about to mention, the conduct of the merchant excluded the presumption of a new contract.

The ship *Mayflower* was chartered at *Hull*, to proceed from thence to *Shields* for a cargo of coals, and sail thence with to *Lisbon* with the first convoy; the freight at the rate of 20*l.* per keel of coals, to be paid on the right delivery of the cargo. The ship took in her cargo and sailed to *Portsmouth*, where she joined convoy, and sailed there with to *Lymington*, where they were detained some time by contrary winds; at last

(c) *Hunter v. Prinsep*, 10 East, 378.

the sailing instructions, which the master had received from the commodore, were recalled, and the ship returned to *Spithead*, the ports of *Portugal* being shut against *British* ships by the *Portuguese* government. The *French* soon afterwards took possession of *Portugal*, and continued to occupy it until the present action was brought. At the expiration of about two months from the ship's return to *Spithead*, the master formally required the merchants to land the coals, and gave them notice that unless this was done, he would land and warehouse them at their expense and risk, and that he reserved to himself the right of proceeding at law for freight, demurrage, &c. The merchants replied, "If you land the coals, you will take the consequence: we do not consent, if we are to be called upon for freight and expenses." The cargo remained on board the ship nearly two months more, and was then landed by the master after another notice, to which it does not appear that any answer was returned. The coals were afterwards sold by consent of both parties, without prejudice on either side, and produced a clear profit of 166*l.* 18*s.* on the prime cost, after payment of the expense of unloading, landing, and warehousing. The master sued the merchant for a compensation for the portion of the voyage performed, and for the detention of the ship. The action was in the same form as in the case of *Luke v. Lyde*, which was cited in support of the master's claim; but Lord *Ellenborough* said, "That was upon the ground of there having been an acceptance of the cargo by the owner in the course of the voyage, which shewed his election to receive his goods at that place, instead of having them sent on to the place of their original destination; but the acceptance of the goods was the very substance of the new implied contract in *Luke v. Lyde*. But here there has been no agreement to accept the goods; but they were landed and sold without prejudice to either party. The case of *Luke v. Lyde* has been often pressed beyond its fair bearing, but the true sense of it has been explained by my brother *Lawrence*, in *Cook v. Jennings* (*d*), and my brother *Le Blanc*, in *Mulloy v. Backer* (*e*). Then what does this case amount to? The parties have entered into a special contract, by which freight is made payable in one event only, that of a right delivery of the cargo according to the terms of the contract; and that event has not taken

(*d*) See before, p. 398.

(*e*) See before, p. 400.

place. There has been no such delivery; and consequently the plaintiff is not entitled to recover. He should have provided in his contract for the emergency which has arisen" (f).

Again, the *American* ship, *Neptune*, was chartered for a voyage from *Sandy Hook* to *Charlestown*, to take in a cargo, and from thence to *Tonningen*, *Amsterdam*, or *Rotterdam*, there to deliver the cargo to the merchant or his agents, with a proviso, that if advice should be received at *Charlestown*, before the departure of the ship from that place, that the blockade had been taken off the river *Elbe*, the merchant should be at liberty to send her to *Hamburg* direct, in lieu of the other ports. Under this charter-party the ship took in a cargo of sugar and rice at *Charlestown* in *August*, 1807, consigned by the bills of lading to Messrs. *R. Groning & Co.* of *Hamburg* to be delivered to them at *Tonningen*, (or in case the blockade of the *Elbe* was taken off, to proceed on to *Hamburg* direct) on payment of freight pursuant to the charter-party. In sailing up the Channel, the master received information of the *British* orders in council issued in *November*, 1807, directing the capture and condemnation of vessels trading to places at war with *Great Britain*, or from which the *British* flag was excluded; but further directing that all vessels which should arrive at any port in the *United Kingdom*, in consequence of information of this regulation received after taking their cargoes on board, should be permitted to proceed upon their voyage to their original port of destination, if not previously unlawful. In consequence of this information, the master brought his ship to *Sheerness*, and came to *London*, to consult the merchant's agents there. They soon procured his Majesty's license for the ship and cargo to proceed to *Rotterdam*, or any port in the North Sea, and they urged the master to proceed to *Rotterdam*. But the master finding that under a *French* decree, the ship and cargo might be liable to *French* confiscation, for having touched at an *English* port, refused to proceed on the voyage. And on the one hand, the master offered to deliver up the cargo on being paid his freight and charges, while on the other hand, the agents refused to receive it, and insisted that he was bound to complete his voyage according to the charter-party. After some time, the master brought the ship to *London*, and there landed the cargo, and again offered to

(f) *Liddard v. Lopes and Another*, 10 East, 526.

deliver it on payment of his freight and charges: the agents still refused, and apprehending the master was about to sell the cargo, they applied to the Court of Chancery, to restrain him from so doing and to compel him to deliver it to them without prejudice to the merchant's claim of damages for the non-performance of the charter-party. The master insisted that he had a lien upon the cargo for freight and charges. The *Lord Chancellor* granted the injunction, and directed two questions to be tried in a court of law: first whether the master was entitled to any, and what sum of money for *freight* on this cargo; and secondly, whether he was entitled to any, and what sum of money by way of compensation for the carriage of the goods from *Charlestown* to *London*. In the meantime, the goods were ordered to be delivered to the agents by consent, without prejudice to the rights of the parties. The questions came on for trial before Lord *Ellenborough*, who is reported to have expressed himself as follows: "It is clear that in this case, the plaintiff can have no claim for *freight*. Freight could only be earned by performing the terms of the charter-party. Then, is he entitled to any sum by way of *compensation* for the carriage of the goods from *Charlestown* to the port of *London*? his right to compensation must arise out of some contract expressed or implied. There is no express contract set up: and from what can we imply a promise to pay for the carriage of the goods to *England*? They are brought here instead of being conveyed to their port of destination, and an application being made to the *Lord Chancellor*, to prevent their being tortiously disposed of by the captain, they were taken possession of on behalf of the consignee, without prejudice to the rights of the parties. This is no acceptance of the goods short of the port of destination, and no foundation for a promise to pay *pro ratâ itineris*. I am, therefore, of opinion, that both issues must be found for the defendant." This was accordingly done; and the direction of the learned Chief Justice was afterwards approved by the *Lord Chancellor* (g).

These cases, therefore, establish that acceptance of the goods is necessary to found an implied contract for the payment of freight *pro ratâ itineris*. In the case of *Luke v. Lyde*, the acceptance was the only ground upon which the implication

(g) Osgood v. Groning, 2 Campb. 466.

could be raised, and must have been thought a sufficient ground; for the master had not offered to carry forward the goods, nor could have done so without hiring another ship, for which he must have paid more than the amount of his full freight. Still, it may be questionable whether acceptance alone shall, in all cases, and as a general rule, be sufficient to raise such an implication, especially if the rateable computation is to be made according to distance or time. To be sure, if the law of *England* has positively established the duty, a promise to discharge the duty may be inferred in this, as in other cases; but still, the question will remain, has the law of *England* so established the duty? In the case of the ship *Neptune*, which I have just quoted, the *Lord Chancellor* afterwards directed the second question to be tried again in a court of law, and ordered the merchant to admit that he had accepted the goods at the port of *London*, if it should appear that the master could not reasonably have been required to proceed on the voyage; considering that if the master could not reasonably have been required to proceed, the merchant ought to have accepted the goods, and his refusal to accept them was an act against conscience, and a proper subject for the jurisdiction of a Court of Equity, which, on many occasions, places parties in the situation, in which they would stand if that which ought to have been had been actually done. At the second trial, the jury, upon the evidence before them, were of opinion that the request to proceed to *Rotterdam* was a reasonable request, it appearing that other *American* vessels had, under similar circumstances, delivered their cargoes in safety at *Rotterdam* at the same period of time. The fault, therefore, fell upon the master, the verdict at law passed against him, and he was ultimately ordered to pay the costs of the suit in Equity; and no decision could be made upon the master's right to compensation generally, or upon the particular amount to which he might be entitled (*h*). But it is observable that the form of the question directed to be tried left the right of the master to any compensation open for the consideration of the Court of Law, even if it should appear that the merchant ought to have accepted, or had accepted the goods. For the jury are not directed, in that event, to award a compensation absolutely, but are to try, in the first place, whether the master was

(h) *Osgood v. Groning*, 2 Campb. 471, and from the papers in the cause.

entitled to any compensation. It seems probable that the carriage of the goods from *Charlestown* to *London* was a benefit to the merchant, though a less benefit than the carriage of them to *Rotterdam* would have been (i).

The authority of the Court of Admiralty being exercised upon the ship and cargo *in specie*, or (which 'is in effect the same thing) upon the proceeds of a sale made under its own decrees, is very different from that of a Court of Common Law. The nature of this jurisdiction, as applied to the subject now under consideration, will be best collected from the report of the explanation given of it by Lord *Stowell*, as follows: "In the case of the *American* ships bound to *France* or *Holland*, which were brought into the ports of this country under the prohibitory law, the full freight was pronounced to be due where the owners of the cargoes elected to sell here; where they did not elect to sell here, the Court left it to them to settle the freight with the owners of the ships. The Court considered a voyage from *America* to this country very nearly the same in effect as a voyage to those contiguous countries to which those vessels were originally destined; in all probability, the markets of this country were not less favourable than in the blockaded ports, and no doubt the sale was effected with every attention to the interests of the owners of the cargo. In those cases, the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Courts of Common law, it could not say that the delivery at a port in *England* was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court 'sits no more than the Courts of Common Law do,' to make contracts between parties; but as a Court exercising an equitable jurisdiction, it considers itself bound to provide as well as it can for that relation of interests, which has unexpectedly taken place under a state of facts, out of the contemplation of the contracting parties in the course of the transaction" (k).

The preceding passage has been extracted from the report of a case of peculiar hardship. The *British* ship *Friends*,

(i) See the next section. The cargo was sugar and rice, principally sugar.

(k) In the case of the *Friends*, Creighton, 1 Edw. Ad. Rep. 246.

being chartered at *Campeachy* to deliver a cargo at *Lisbon*, sailed therewith to the very entrance of the *Tagus*, and being there warned off by the blockading squadron, continued some days with the fleet, but was afterwards blown out by a gale of wind, taken by a *Spanish* privateer, retaken by a *British* cruizer, and carried into *Madeira*, where the ship and cargo were sold by the re-captors, to pay the salvage. A decree was afterwards made for the restoration of the ship and cargo (*l*), and the Court was called upon to consider what freight should be allowed under the circumstances of the case. The owner claimed the whole freight, as the ship had gone up to the very mouth of the destined port; the merchant contended that nothing was due because the cargo was not delivered according to the terms of the charter-party. The learned judge, explaining the nature of his jurisdiction in the words that have been just quoted, and considering the calamity as common to both parties, and not attributable solely to either, for the ship could not have entered the port in ballast, nor the cargo in any other ship, thought that equity suggested a division of the loss, and directed a moiety of the freight to be paid (*m*).

It may be proper to remark, that in this case the learned judge did not apply the rule of payment *pro ratâ itineris* in the same strict way in which it was applied by the Court in *Luke v. Lyde* (*n*), and by the opinion of Lord *Mansfield* in *Baillie v. Moudigliani* (*o*). The only essential difference between this case and *Luke v. Lyde* is the acceptance of the cargo; for there the cargo was burthened with salvage to the amount of one-half, and the Court dealt with that circumstance by considering half the cargo as actually lost, and half only as delivered and accepted. In *Baillie v. Moudigliani*, the whole had been originally sold, as here, under the decree of a Court of competent jurisdiction, and the subsequent award of restitution could operate only upon the proceeds of the sale.

§ In a recent case, the ship *Jane* (*p*) was chartered by an agreement not under seal, to proceed with a cargo of coals from *London* to *Solada* in the river *Plata*, and either there or at *Buenos Ayres* deliver the same, there reload and proceed to a port be-

(*l*) Probably this must mean of the proceeds, deducting the salvage, &c.

(*m*) *The Friends*, Creighton, 1 Edw. Ad. Rep. 246.

(*n*) See before, sect. 13, of this chap-

ter, p. 395.

(*o*) See before sect. 13 of this chapter, p. 397.

(*p*) *Mitchell v. Darthez*, 2 Bing. N. C. 555.

tween *Gibraltar* and *Antwerp*, as the freighter's agents may direct; freight for the voyage out and home 1300*l.* in full, if delivered at *Gibraltar*, a port in *Spain*, or *London*, or *Liverpool*, to be paid as follows, 200*l.* in *London* on the vessel being despatched from *Portsmouth*; cash for the necessary expenses of the vessel in the river *Plata*, to be advanced there at the 'current rate of exchange upon *London* free of commission; and the remainder to be paid on final delivery of the homeward cargo in cash.

The vessel sailed from *Portsmouth*, and the history of the voyage is detailed in the judgment of the Court of Common Pleas, "In this case," said Chief Justice *Tindal*, "two questions arise, first, whether the plaintiff is entitled to recover the full freight agreed to be paid by the charter-party; and secondly, if not entitled to recover the full freight, whether he is entitled to recover any, and what freight *pro rata itineris*.

"First, in order to entitle the plaintiff to recover the full freight, he must establish that he has performed the voyage prescribed by the charter-party. The first part of the voyage was duly performed by the arrival of the ship at *Buenos Ayres*, and a destination for the accomplishment of the homeward voyage was given by the freighter there, who appointed *Gibraltar* as the port of discharge. But the plaintiff never performed that homeward voyage, either in the ship mentioned in the charter-party, or in any other. The original ship and about one-third of the cargo having been lost by the perils of the seas, the remainder of the cargo was left at the Island of *Fayal* by the master, who on the 12th of *July*, sailed in another vessel for *England*, having left instructions with the Vice Consul at *Fayal*, to forward the remainder of the cargo, (about two-thirds) by the earliest opportunity to *Gibraltar*, the master having been wrecked on the next day, returned to *Fayal*, and remained there until the 24th of *July*, when he again sailed for *England*, having on the 23rd addressed a letter to the Vice Consul, stating his having been informed of the expected arrival of a vessel originally destined for *Newfoundland*, and recommending the Vice Consul, if he could not obtain a reduction of 400*l.* for the freight, to give that sum for the conveyance of the remainder of the cargo to *Gibraltar*, rather than an opportunity of sending the cargo forward should be lost. No authority appears to have been given to the Vice Consul to make any contract for the hire of a vessel on account of the owners of the *Jane*. The master of the *Jane* certainly did not make any,

nor did he personally make provision for the conveyance of the remainder of the cargo to its destination, much less superintend its transshipment, or accompany it to the port of discharge. Before his departure from *Fayal*, no vessel of sufficient capacity to convey it had arrived at *Fayal*, but on the 29th of July, such a vessel had arrived, the Vice Consul chartered the vessel on behalf of the owners of the cargo of the *Jane*, at a freight of 360*l.* for the conveyance of the goods to *Gibraltar*. Under this charter-party, the vessel so hired by the Vice Consul on behalf of the owners of the cargo, sailed to *Gibraltar* and delivered to them, who received and paid freight and charges 378*l.* Under these circumstances it appears to us that the goods which were so left by the master of the *Jane*, at *Fayal*, having been forwarded to *Gibraltar* by the Vice Consul, acting in the name and on behalf of the owners of the cargo, and at their expense, cannot be said to have been carried to their destination by the owner of the *Jane* in fulfilment of the charter-party, entered into with the defendants, and consequently that the freight stipulated to be paid by the charter-party has not been earned. •

“The next question is, whether any thing in the nature of freight is recoverable by the plaintiff upon a new and implied contract, founded on meritorious service, rendered to the defendants by the plaintiff in the partial performance of the voyage contemplated, and the acceptance of the goods by them under the circumstances stated in the case. The carriage of the goods from *Fayal* to *Gibraltar*, not having been the act of the plaintiff, we are of opinion that no claim to freight can be made by the plaintiff for that portion of the voyage. And we are also of opinion that the plaintiff has no right to claim any freight *pro rata itineris* for the outward voyage from *England* to *Buenos Ayres*.

The freight for the entire voyage was a gross sum of 1300*l.* of which 200*l.* was to be paid in *England*, in cash for the necessary expenses of the vessel in the river *Plata*, and the residue at *Gibraltar*, at the current exchange upon *London*. If the vessel had arrived at *Buenos Ayres*, and had been lost immediately afterwards, we think that nothing beyond the 200*l.* paid in *London* could have been claimed. But as she actually brought from *Buenos Ayres* to *Fayal*, on her way to *Gibraltar*, a considerable portion of the cargo put on board at *Buenos Ayres*, which portion has come to the hands of the freighters and been accepted by them, the question arises, whether the shipowner has not a claim to freight *pro rata* for the conveyance of that portion of the goods from *Buenos*

Ayres to Fayal, and upon the best consideration which we can give to the case, we think he has such claim.

“ We have already said that the goods were forwarded by the Vice Consul acting as the agent of the freighters, but the Vice Consul was desired by the master of the *Jane* to forward them, though not desired to forward them on the behalf of the shipowner. The agents of the freighters at *Gibraltar* have accepted the goods, paid the freight, and thereby recognized the act of the Vice Consul as their agent. The case, therefore, must stand in the same position as if the freighters had accepted the goods of the master of the *Jane* at *Fayal*, and conveyed them on their own account to *Gibraltar*, in which case we think that they would be liable to pay freight for that portion of the voyage in respect of the goods accepted. At what rate the freight is to be calculated is the remaining question to be considered, and we are of opinion that the shipowner under the circumstances of this case, cannot claim any remuneration beyond reasonable freight from *Buenos Ayres to Fayal*, the amount of which the arbitrator will determine. The freight agreed upon by the charterer was not of an ordinary kind, but a gross sum to be paid in case of the performance of an extraordinary voyage. That voyage has not been accomplished, the voyage was not in its nature divisible so as give to the shipowner a claim to any aliquot part upon the performance of a certain portion of the voyage. The claim of the shipowner must, therefore, rest upon an implied contract to remunerate him for service performed, not according to the agreement, but a service from which the freighters have received a benefit, and whether upon the whole, the shipowner has been overpaid or not will appear, when the account is taken by the arbitrator on this principle between the parties.”

It will be seen, from the report of this case, that it was contended, on the part of the plaintiff, that in chartering another ship for the conveyance of the cargo from *Fayal* to its destination, the consul acted as the agent of the shipowner, and that the latter had thereby performed his contract. If the facts of the case had supported that position, it is probable that the plaintiffs would have been considered entitled to the whole freight, as stipulated by the charter-party; but the learned Chief Justice was of opinion, that the consul acted as the agent, not of the shipowners, but of the owners of the cargo. The former having failed to convey the goods to their destination, was held not entitled to receive the freight for which he had stipulated; and the merchant, who had

accepted the goods at a place short of their destination, was considered to have entered into an implied contract to remunerate the shipowner for such service as he had actually performed.

In the recent case of *Shipton v. Thornton* (g), the plaintiff in assumpsit brought his action for freight, in respect of certain goods and merchandize carried and conveyed from *Sincapore* to *London*, and there delivered to the defendant.

It appeared on the trial, that in *January* 1836, the agent of the defendant shipped at *Sincapore*, on board the *James Scott*, belonging to the plaintiff, certain goods under a bill of lading, by which it was stipulated, "that the goods were to be delivered at the port of *London* to *Richard Thornton*, Esq., or his assigns, he or they paying freight for the said goods as per margin. The *James Scott* proceeded on her voyage with a general cargo; but, encountering severe gales, was obliged to put into *Batavia*; and on her arrival there, in consequence of the damage to the ship and cargo, a transhipment was found necessary; and the cargo, including the goods of the plaintiff, was transhipped to the *Mountaineer* and *Sesostris*, and bills of lading were drawn for delivery of the cargoes to *William Ellward*, Esq. or his assigns, he or they paying freight. On the arrival of the last mentioned vessels with their cargoes in *London*, the defendant claimed and obtained both parcels of goods, under the bill of lading, *per James Scott*; but contended that he was only bound to pay freight *pro rata* from *Sincapore* to *Batavia*, and the actual freight *per Mountaineer* and *Sesostris*.

Lord *Denman*, delivering the judgment of the Court of King's Bench, said, "Upon the trial, it appeared that the plaintiff had been paid freight by the *James Scott*, at the rate originally agreed on, for so much of the voyage as had been performed up to the ship's arrival at *Sincapore*, and for the remainder of the voyage to *London*, at the rate of which he had contracted for the carriage of the goods by the *Mountaineer* and the *Sesostris*. The action was brought for the difference between the two rates for that portion of the voyage; and it was objected, that for this portion of the voyage he was not entitled to receive more than he had actually paid; while, on the part of the plaintiff, it was contended, that the necessity of the transhipment being assumed, which it must be for the purpose of the argument, the *Mountaineer* and *Sesostris* were to be considered as the *James Scott*; that the

(g) 1 Perry & Davidson, 216, ante, p. 323.

master had fulfilled his undertaking in carrying the goods to their destination, and had, therefore, earned his full freight, while it was a matter of indifference to the owner of the goods whether they had arrived safe by one vessel or the other. No authority bearing directly on the point, from our own law books, was cited on either side in the argument. It was treated very much as a new point, to be decided on principle: and our own researches have led us to the same conclusion. On the part of the defendant, we were pressed with the impolicy of holding out any temptation to the shipowner or master to make unnecessary transshipments of goods; the inconvenience of any transshipment, whereby the goods themselves run the hazard of damage; the policy of insurance may become questioned, and the owner of the goods, at all events, loses the benefit of a conveyance by that vessel in which he may be supposed to have confidence, and for which, at all events, he has stipulated. All these circumstances, coupled with a consideration of the unprotected state in which his interests are at a distant port, must certainly be allowed to have great weight. But, after all, these seem to point to a vigilant examination of every case of transshipment, to see that its necessity be well established, rather than to decide the present question. This must turn upon the nature of the contract between the parties, as it is to be collected from our own books, and still more fully, perhaps, from those foreign laws and ordinances, as well as the writings of those jurists to which our Courts have long been accustomed to have recourse for guidance on subjects of this nature."

His Lordship, after an elaborate review of the foreign authorities on the subject of transshipment, for which the reader is referred to a previous chapter of this work (r), delivered the judgment of the Court, that the plaintiff was entitled to recover the difference he sued for. §

18. But as the right to freight does not commence until the ship has broken ground and begun the voyage, no partial payment can be claimed for goods laden on board if, even without the fault of the master, the ship is prevented from actually setting forth on the voyage. And therefore, in the case of a ship which took on board a cargo in *Salt River*, in *Jamaica*, at a very great expense to the owners (who by the usage of the *West India* trade fetch the cargoes from the shore at *their* expense), and which

(r) Ante, p. 323.

actually cleared out for the voyage, but, while waiting for convoy, was cut out of the river by two *French* privateers; and being afterwards retaken, was carried into *Port Royal*, where the cargo was sold under an order of the Court of Admiralty, and the proceeds thereof, with the deduction of salvage paid to the merchants: it was decided that nothing could be claimed of the merchants, although each of the judges expressly recognized the rule of the marine law as to the partition of freight *pro ratâ itineris*; the Court holding, that in this case there had been no commencement of the voyage, and therefore no freight could be due; and that, as the freight was by the contract the only remuneration of all the services performed by the owners, they were not entitled to any recompence for the expense of taking the goods on board (r).

19. It often happens that a ship is hired by a charter-party to sail from one port to another, and from thence back to the first; as, for instance, from *London* to *Leghorn*, and back from thence to *London*, at a certain sum to be paid for every month or other period of the duration of the employment. Upon such a contract, if the whole is one entire voyage, and the ship sail in safety to *Leghorn*, and there deliver the goods of the merchant, and take others on board to be brought to *London*, but happen to be lost in her return thither, nothing is due for freight, although the merchant has had the benefit of the voyage to *Leghorn*; but if the outward and homeward voyage are distinct, freight will be due for the proportion of the time employed in the outward voyage (s).

Upon this point *Malyne* mentions a remarkable case of five ships, in which he himself was interested, as one of the merchant freighters. The whole five were freighted out from this country for *Leghorn* and *Civita Vecchia*, and back from those places. They all performed their outward voyage, but before any part of the homeward cargo was shipped, they all set sail, and came away, through fear of being taken by the gallies of *Don Andrea Doria*, who intended to surprise them, the *Grand Armada* being then preparing in *Spain*. Two of the ships had waited for their lading the whole time stipulated by their charter-parties, and the

(r) *Curling v. Long*, 1 Bos. & Pull. 634.

(s) This proposition is laid down by *Molloy*, book 2, chap. 4, sect. 9, and he

cites in support of it the before-mentioned case of *Bright v. Cowper*, with a reference to *Brownlow*, in whose report the point does not appear.

masters had made their protests against the factors, who should have laded them. These two, says the author, were by the law of the Admiralty adjudged to have deserved their whole freight. Two others not having waited the stipulated time, could not be found to have deserved any freight at all, although they were laden outward. The fifth ship also had not waited the stipulated time; but her charter-party contained a proviso, that if she should be taken or cast away on her return out of the *Streights*, the freight outwards, which was accounted half, should be paid; and that half, and no more, was adjudged to the master (t).

It should seem that this proviso, in the case of the fifth ship, occasioned the outward and homeward voyages to be considered as distinct voyages, for the event mentioned in the proviso had not happened. And a similar construction was given to a very different charter-party in the following case (u). *Mackrell*, the owner of a ship called the *Richard*, lying in the river *Thames*, let his ship to freight by a charter-party, dated 9th of March, 1774, to *Simond & Hankey*, "by the month, for such time as she should be employed in performing a voyage from *London* to *Plymouth*, and the island of *Grenada*, and from thence back to *London*," whereby the plaintiff covenanted, "that the ship should, pursuant to the orders and directions of the freighters, their factors or assigns, prosecute and perform the voyage above-mentioned (the dangers and perils of the sea, and the restraint of princes and rulers excepted), and should in such outward and homeward voyage load and unload all lawful goods;" and that his ship's company and boats should aid and assist in unloading and reloading the said ship's cargoes, as customary at the island of *Grenada*, and that he would pay all port-charges and pilotage. In consideration whereof, the defendants covenanted that they "would load and unload the ship, and give the master proper orders in respect thereof; and that the ship should be discharged out of her said monthly employ on the delivery of her homeward cargo in *London*, and also should and would well and truly pay

(t) *Malyne*, p. 98.

(u) *Mackrell v. Simond and Hankey*, in K. B. in Trin. Term, 16 Geo. 3. It was an action of covenant on the charter-party, in the first count of which the plaintiff claimed freight for the period of

the voyage to *Grenada*; in the second, up to the day of the loss of the ship. The defendants demurred to both counts. Judgment was given for the plaintiff on the first count, and for the defendants on the second.

or cause to be paid to the said owner, his executors, administrators, or assigns, in full for the freight and hire of the said ship, at the rate of 110*l*, sterling per calendar month, for all such time as the said ship should be taken up in performing the voyage aforesaid, to commence and be accounted from the day of the date of the said charter-party, and to end and determine on the day of the discharge of the homeward cargo at *London*, and to be paid one-third part thereof on her report inwards at the Custom-house, *London*, and the remaining two-third parts thereof in two calendar months then next following."

In pursuance of this charter-party, the ship took in goods belonging to the merchants *Simond & Hankey*, at *London*, sailed with them to *Plymouth*, and there took in other goods belonging to them, and from thence proceeded to *Grenada*, and there landed the cargo; and received another cargo from the merchant's factor there, with which she set sail for *London*; but on the way was lost by tempest. The voyage to *Grenada* occupied *three* months; and *five* months elapsed in the whole before the loss of the ship. After the misfortune, the owner brought an action against the merchants, claiming of them the payment of freight, either for *three* or for *five* months. The merchants insisted that nothing was due. The Court decided that freight was payable for *three* months, the period of the outward voyage. And Lord *Mansfield* delivered his judgment to the following effect: "This question depends upon the construction of the charter-party. If the parties have expressed their meaning defectively, the Court must be guided by the nature of the thing. The charter-party puts no case but that of a prosperous voyage out and home: it provides for freight on the supposition that the ship will arrive safe and report her cargo. No provision is made for any other case. If the ship be cast away on the coast of *England*, and never arrive at the port of *London*, yet, if the goods are saved, freight shall be paid, because the merchant receives advantage from the voyage. This is not expressed by the charter-party, but arises out of the equity of the case. Freight is the mother of wages,—the safety of the ship the mother of freight: that is the general rule of the maritime law. If there be one entire voyage out and in, and the ship be cast away on the homeward voyage, no freight is due, no wages are due, because the whole profit is lost; and by express agreement the parties may make the outward and homeward voyage one. Nothing is more common than two voyages: wherever

there are two voyages, and one is performed, and the ship is lost in the homeward voyage, freight is due for the first. Here the outward and homeward voyage are so called in the charter-party. The cargo is loaded outwards, and the owner covenants to pay port-charges on the outward voyage. The whole of that voyage was completed: port-duties are incurred and paid. Nothing, however, is due on the homeward voyage, though the ship might be out a month."

In the following case (x) the words of the charter-party being different, a different construction prevailed. One *Pattinson*, master and part-owner of the ship *William & Mary*, lying at *Liverpool*, by a charter-party, dated 28th July, 1794, let the ship to freight to *Byrne & others*, for a voyage intended to be made from *Liverpool* to the island of *Madeira*, and from thence to the island of *Barbadoes*, and from thence back to *Liverpool*, *Greenock*, or *Bristol*, but with liberty for the freighters to order the said vessel from *Barbadoes* to any other island in the *West Indies* (*Jamaica* excepted) they paying all pilotage and port-charges incurred thereby. And the said freighters, accordingly, by the said charter-party took and hired the same in manner following, that is to say, that the master should immediately receive, and take a cargo on board the said vessel from the freighters, and the said vessel so loaded should immediately proceed direct to *Madeira*, and deliver such goods as should be ordered by the said freighters, and also should receive and take on board the said vessel at *Madeira* such other goods as the said freighters might think proper to ship, and that being done, the master should proceed with the said vessel to *Barbadoes*, and there make delivery of her cargo, and receive and take on board a cargo from the freighters, and being laden therewith, should, with the first opportunity, proceed direct to the port of *Liverpool*, *Greenock*, or *Bristol*, and there deliver the same cargo, and so end the said intended voyage. In consideration of which, the said freighters thereby promised and agreed, amongst

(x) *Byrne and Others v. Pattinson*, in K. B. Trin. Term, 37 Geo. 3. The question arose on a set-off, pleaded by the defendant, the master of the ship, to an action brought against him on another account by the merchant. The plea did not refer to the charter-party, but was for the freight and hire of the ship from *Liverpool* to *Madeira*, and from thence o

Barbadoes, and for the disbursements and port-charges of the ship at *Madeira* and on the voyage, and for work and labour generally, and money paid; so that the decision did not turn upon the form of the proceedings in the cause. The question came before the Court by a special case reserved from the assizes.

other things, to pay to the *defendant* in full for the freight and hire of the ship for the said voyage, the sum of 136*l.* 10*s.* per calendar month, for six months certain, to commence in eight days after she was ready to receive the cargo at *Liverpool*, and to continue until she was discharged at *Liverpool*, *Greenock*, or *Bristol*, together with two-thirds the amount of all pilotage and port-charges, that might accrue, and be paid during the course of the said voyage, with customary primage; payment thereof to be made in manner following, *viz* : 136*l.* 10*s.* to be advanced before sailing from *Liverpool*, by a good bill at three month' date, and what cash might be required for the said vessel's disbursements and port-charges at *Madeira* and *Barbadoes*, to be paid in part of the said freight, and the remainder of the said freight should become due, and be paid on the final discharge of the said vessel at *Liverpool*, *Greenock*, or *Bristol*, by good bills on *London* at three months' date. The period of computation commenced on the 7th *August*, 1794; on the 19th of that month, the ship sailed from *Liverpool* for *Madeira*, freighted with goods, and arrived there on the 19th of *September*; and discharged at that place, by the 4th of *October*, as many of the goods as were to be delivered there, and took on board, on account of the merchants ninety pipes of wine, and sailed from thence on the 9th of *October* for *Barbadoes*, but, on the 10th of *November*, was captured on the way thither. The merchants had paid 135*l.*, part of the freight for the first month, and also the port charges and disbursements for the ship at *Madeira*. *Pattinson* now claimed in the present suit further freight from the 7th of *September* to the day of the ship's capture, or to the day when she had completed the delivery at *Madeira*, or freight for the goods delivered there, at the usual rate of conveyance, allowing the 135*l.* But the Court held that he had no claim whatever. On his part it was contended that there ought to be an apportionment in this case; and the passage before cited from *Malyne*, relating to a ship lost at *Dover*, was quoted as an authority in his favour. But Lord *Kenyon*, Chief Justice, said, "In that case, the goods came to the merchant's hands, and the owner of the ship might have provided another ship to carry them to *London*. In this case, by the terms of the contract, the freight is to become due at *Liverpool*, and therefore it cannot be claimed before."

These two cases may serve as a guide for the construction of other charter-parties on the same subject, or for the framing of a

charter-party in such a manner as to express the real meaning of the contracting parties, without ambiguity.

20. By a charter-party, made for a voyage from *London* or *Portsmouth* to *Monte Video*, and back to some port of discharge in *Great Britain*, with a provision that the master should touch at the coast of *Africa* for a certain purpose, if required, the freighter covenanted to pay 670*l.* per month, for every calendar month the ship should be employed by him, the freighter, during the said intended voyage to *Monte Video*, and back to her port of discharge, and so in proportion for any less time, in full for the hire of the ship during her intended service; such freight to commence from the day the ship should be ready to receive goods on board at *Portsmouth*, and end when she should have finally discharged the whole of her said cargo; and also pay two-thirds of all pilotage and port-charges during the whole of the voyage, and also two-thirds of all expenses of stowing the said ship's cargo at *Monte Video*; such freight, pilotage, and port-charges to be paid on the arrival and discharge of the ship at her destined port in *Great Britain*. Upon this contract, an action was brought against the freighter, and it was alleged, on the part of the owner, that the ship took in such goods at *Portsmouth*, as the freighter thought fit to lade, and then proceeded on the voyage, and touched at the coast of *Africa* as required, and, in the prosecution of the outward voyage, was, before her arrival at *Monte Video*, without the fault of the owner, master or crew, by persons unknown, wrongfully seized, and sent to *London*, and there detained for a considerable time, but afterwards liberated and restored to him; that he then made the necessary repairs, and having properly fitted, victualled, and manned the ship, gave notice thereof to the freighter, and offered to prosecute and complete the voyage, and required from him the necessary directions for that purpose, but that the freighter refused to give any directions, or to permit the ship to pursue the voyage, and wholly renounced the charter-party, and discharged the owner from further prosecuting the voyage. It was further alleged that the ship had been employed in the voyage twelve months, and that the freight thereof amounted to 8040*l.*; that she would have been employed for twelve months more, if the freighter would have permitted, and the freight thereof would have amounted to another sum of 8040*l.* and that two-third parts of the pilotage and port-charges during the voyage amounted to 50*l.*; and the com-

plaint was that the freighter, who had been requested to pay these sums, had refused to do so. So that by the form of the action the owner claimed to recover the freight, &c. as due, and not to recover damages against the freighter for refusing to allow him to prosecute the voyage (y). And on behalf of the owner it was contended, that as he had done all in his power toward the completion of the voyage, and the further prosecution and completion of it were prevented by the freighter, he had acquired a right to the sums demanded as freight, &c. as fully as if the voyage had been performed, and the ship had arrived and been discharged at her destined port. But the Court, adverting to the particular terms of the contract, whereby the freight, &c. were made payable on the arrival and discharge of the ship at her destined port in *Great Britain*, and considering that the efforts of the owner could not possibly insure this event, which might be defeated by the act of God, and various accidents, to which marine adventures are subject, held this not to be one of those cases, in which an offer to perform an act, if refused by the party to be charged by the performance, is equivalent to performance itself, and consequently that the owner was not entitled to recover the freight, &c. which he claimed in this action (z).

Also in the case of a ship which arrived with a cargo at *Naples*, where the cargo was seized by the government, and so the master was prevented from delivering it to the consignee of the merchant, it was held that the merchant was not liable to pay the outward freight (a). Again, where by charter-party a ship was hired to receive a cargo in *London*, and proceed to such places as the merchant should direct, and there unload, reload, and return from thence to *London*, and it was agreed that the ship should continue in the service six calendar months at least, and for such further time as would be necessary to complete the voyage, and the merchant covenanted to pay to the owner for the use of the ship, a certain sum *per ton per month*, during the term of six calendar

(y) It is not clear that the charter-party contained any covenant on the part of the freighter that would have furnished a ground for such an action for damages.

(z) *Smith v. Wilson*, 8 East, 437. It was an action of covenant; the facts stated in the text were contained in the plaintiff's declaration. The defendant

pleaded some special pleas to which the plaintiff demurred. Upon the argument, the Court disregarded the pleas, and gave judgment against the plaintiff upon the declaration.

(a) *Storer v. Gordon and Others*, 3 M. & S. 308.

months at the least, and so in proportion for a less time than a whole month, and at the like rate for such further time, if any, and until her final discharge in *London*, or up to the day of her being lost, captured or last seen or heard of, such freight to be paid to the master in cash, in manner following; *viz.* so much as might be earned at the time of the arrival of the ship *at the first destined port abroad*, to be paid within ten days after arrival at such port, and before the delivery of the cargo, and at the expiration of every month after that period, the freight to be paid up from time to time, during the continuance of the ship in the service, and the residue or balance on the day the ship should be finally discharged from the service. And that in default of payment of any part, the master might retain and sell so much of the cargo as might be sufficient to cover the amount; and there was a proviso in the charter-party that the merchant might at any time during the voyage, purchase the ship for a specified sum, upon paying the freight that might be earned up to the time of such purchase. And in fact, it happened that the ship was lost by perils of the sea, before arrival at her first destined port. It was decided that nothing was payable (b)..

In all these cases the Court thought, that according to the true construction of the contract, the payment was made to depend upon an event which never happened.

(b) *Gibbon v. Mendez*, 2 B. & A. 17.

CHAPTER IX.

OF GENERAL OR GROSS AVERAGE.

1. HAVING thus treated of the respective duties of the owner and the merchant, I now proceed to the consideration of a subject, which is equally a duty of the one and the other: namely the General Contribution, that is to be made by all parties, toward a loss sustained by some for the benefit of all. This contribution is sometimes called by the name of *general* average, to distinguish it from *special* or *particular* average, a very incorrect expression, used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever; and sometimes by the name of *gross* average, to distinguish it from *customary* average, mentioned in the bill of lading, which latter species is sometimes called also *petty* average.

The principle of this general contribution is known to be derived from the ancient law of *Rhodes*, being adopted into the Digest of *Justinian*, with an express recognition of its true origin. The wisdom and equity of the rule will do honour to the memory of the state, from whose code it has been derived, as long as maritime commerce shall endure. The principle of the rule has been adopted by all commercial nations, but there is no principle of maritime law, that has been followed by more variations in practice. The modern ordinances of the several continental states of *Europe* differ from each other in many particulars relating to this general contribution, and the *French* Ordinance establishes a different mode of contribution in different cases. An enumeration of these varieties would furnish little entertainment or instruction to an *English* reader: discordant rules rather serve to perplex the choice, than to guide the judgment. If any one is desirous of knowing all that doctors have written and states ordained, on these particulars, I must refer him to other writers, and particularly to the very elaborate and learned treatise of *Emerigon* (a), or to the recent pub-

(a) Chap. 12, sects. 39 to 42. See also on the subject of this chapter, Weskett on Insurance, titles, Contribution, Cut-

ting, General Average, and Jettison, in which are many citations from the foreign ordinances.

lication of Mr. *Benecke* on insurance, in which latter work there is much learning combined with practical experience. The determination of *English* Courts of Justice, furnish less of authority on this subject, than on any other branch of maritime law; there being few reported cases of questions either between the parties liable to contribution in the first instance, or between a party so liable and an insurer, from whom indemnity has been sought. The work of *Magens* contains a variety of cases of adjustment of average, by consuls and courts abroad, and by merchants at home, detailed with all the tedious formularies of the notarial office, and the minutiae of the counting-house, but accompanied by some very judicious remarks. Much useful information upon this subject is to be found in Mr. *Park's* system of marine insurances, and also in the publication by Mr. Serjeant *Marshall* on the same subject, but as the nature of the present work requires that it should also be treated of here, I shall examine, *first*, the cases in which general contribution is to be made; *secondly*, the articles that are to contribute; and *lastly*, the mode of contribution; confining myself as closely as possible, to the authorities and practice of our own nation, or to those ancient laws and ordinances, which are generally considered as guides by *English* lawyers on subjects of maritime law (*b*).

2. The rule of the *Rhodian* laws is this: "If goods are thrown overboard in order to lighten a ship, the loss, incurred for the sake of all, shall be made good by the contribution of all" (*c*). The goods must be *thrown* overboard; the mind and agency of man must be employed: if the goods are forced out of the ship by the violence of the waves, or are destroyed in the ship by lightning or tempest, the merchant alone must bear the loss. They must be thrown overboard *to lighten the ship*; if they are cast overboard by the wanton caprice of the crew or the passengers, *they*, or the master and owners for them, must make good the loss. The goods must be thrown overboard *for the sake of all*; not because the ship is too heavily laden to prosecute an

(*b*) Since the publication of the former editions of this book, an Essay on Average has been published by Mr. Stevens, of Lloyd's Coffee House, which contains some very sensible observations on the subject of General Average. The Trea-

tise of Mr. *Benecke*, was published after Mr. Stevens's Essay.

(*c*) Dig. 14, 2, 1. *Legē Rhodia cave-
tur, ut, si levandæ navis gratia jactus mer-
cium factus sit, omnium contributione
sarcietur, quod pro omnibus datum est.*

ordinary course through a tranquil sea, which would be the fault of those who had shipped, or received the goods; but, because at a moment of distress and danger their weight, or their presence, prevents the extraordinary exertions required for the general safety. When the ship is in danger of perishing from the violent agitation of the wind, or from the quantity of water, that may have forced a way into it, or is labouring on a rock, or a shallow, upon which it may have been driven by a tempest; or when a pirate or an enemy pursues, gains ground, and is ready to overtake; no measure, that may facilitate the motion and passage of the ship, can be really injurious to any one, who is interested in the welfare of any part of the adventure, and every such measure *may* be beneficial to almost all. In such emergencies therefore, when the mind of the brave is appalled, it is lawful to have recourse to every mode of preservation, and to cast out the goods in order to lighten the ship, for the sake of all (*d*). *But if the ship and the residue of the cargo be saved from the peril by the voluntary destruction or abandonment of part of the goods, equity requires that the safety of some should not be purchased at the expense of others, and therefore all must contribute to the loss.

3. Many of the foreign ordinances (*e*) have prescribed various forms to be adopted with respect to jettison; some of them have even named the persons to be consulted before it takes place, and have set down the phrases of consultation, and specified the sorts of goods that shall be first thrown; and some authors have amused themselves by dividing the act itself into the several species of regular and irregular, formal and informal (*f*). But the regulations prescribed by persons at ease in the closet or senate-house will seldom be followed at the moment when life, or liberty, is in jeopardy; at such a moment every one present will exclaim with the friend of *Juvenal*, *Fundite quæ meæ sunt—etiam pulcherrima*; and provided the jettison have been the effect of danger and the cause of safety, all writers agree that contribution ought to be made, although the forms have not been complied with. Previous deliberation, if there be time to deliberate, and a due choice of the heaviest and most cumbersome articles, may be proofs of the necessity and propriety of the act; but they are not

(*d*) *Mouse's case*, 12 Co. 63, mentioned also in *Bird v. Astock*, 2 Bulst. 280.

(*e*) *Laws of Oleron*, art. 8 and 9; *Ordin. of Wisbuy*, art. 20, 21 and 38;

French Ordin. liv. 3, tit. 8; *Du Jet.* art. 1, 2, 3, and 4, and *Valin* thereon. *Code de Com.* art. 410, &c.

(*f*) See *Emerigon*, tom. 1, p. 605; *Consolato del Marc*, cap. 47, 48 and 49.

the *only*, and therefore ought not to be deemed the *essential* proofs (*g*). Indeed in this case, as in many others, too close a compliance with forms at a period of supposed danger has very justly excited a suspicion of fraud (*h*). In all cases, however, and in all countries, it is justly required of the master that he draw up an account of the jettison, and verify the same by the oath of himself and of some of his crew, as soon as possible after his arrival at any port, that there may be no opportunity to purloin goods from the ship, and then pretend they were cast over in the hour of danger.

4. From the rule thus established by the *Rhodians*, various corollaries have been deduced. Thus, if in the act of jettison, or in order to accomplish it, or in consequence of it, other goods in the ship are broken, damaged, or destroyed, the value of these also must be included in the general contribution. So, if to avoid an impending danger, or to repair the damage occasioned by a storm (*i*), the ship be compelled to take refuge in a port, to which it was not destined, and into which it cannot enter without taking out a part of the cargo, and the part taken out to lighten the ship on this occasion happen to be lost in the barges employed to convey it to the shore, this loss also being occasioned by the removal of the goods for the general benefit, must be repaired by general contribution; but if, after the removal of goods for such a purpose, the ship with the remaining cargo should unfortunately perish, and the goods in the barges be saved, the proprietors of the latter shall not contribute to the loss of the others, because the safety thereof is not owing to that loss. So, if upon the expectation of an hostile attack, part of the cargo be taken out and sent away, and saved, and the ship with the remainder of the cargo, fall into the hands of the enemy, the part saved shall not contribute to make good the loss (*k*).

§ The *Consolato del Mare*, and the *French Ordinance*, exclude from the benefit of general average, goods stowed upon the deck of

(*g*) So decided in *Birkley and Others v. Presgrave*, 1 East, 220, as to other cases of general average.

(*h*) *Emerigon*, tom. 1, p. 605, cites an observation of *Targa*, who says, that during sixty years in which he had been a magistrate at *Genoa*, conversant with this subject, he had known only five instances of regular jettison, all of which were suspected of fraud, because the forms

had been too well observed.

(*i*) In the *Dig.* 14, 2, 4, and the *Guidon*, chap. 5, art. 28, the rule is laid down in general terms, but most writers confine it to the cases mentioned in the text. See *Beawes*, 165; 2 *Valin*, 167; yet see *Wellwood*, tit. 20.

(*k*) *Sheppard v. Wright*, 1 Shower, P. C. 18.

the ship (*l*), and *Valin*, in his Commentary upon the latter, gives two reasons for the exception. In the first place they ought not to be there, and can only be, because the vessel is full without them, or because the master has neglected to stow them elsewhere, in either of which cases, he and his owners are responsible to the shipper, unless the goods were placed there with his consent. Secondly, because there is every reason to presume, that being in the way, they will be thrown overboard, before the necessity of jettison has occurred, on account of the obstruction they create. But he tells us that this does not apply to boats or other small vessels going from port to port, or to trades in which that mode of stowage is sanctioned by custom. The same rule prevails in this country and in *America* (*m*); the exceptions to it were recognized by Lord *Ellenborough* in a case between the owner of goods and the underwriter, and more recently, the reasoning of *Valin* has been adopted by the Court of Common Pleas, in an action against the owner of a ship, to recover contribution to a loss (*n*) by jettison of goods stowed on deck. §

If part of the cargo be voluntarily, and without fraud or cowardice delivered up to a pirate by way of composition or ransom, to induce him to spare the vessel, and the residue of the goods (an event highly improbable), or if a sum of money be agreed to be paid to a pirate or enemy by way of ransom, all writers agree that the value of the part ransomed must contribute to this loss also; but if the enemy or pirate, having overpowered the ship, select for himself such parts of the cargo as best suit his purposes, and plunder the ship of them, in this case there shall be no contribution, because the value of these goods was not the price of safety to others (*o*). But ransom in the case of capture by an enemy, can hardly become the subject of general average in this country, for by an act passed in the twenty-second year of the reign of George

(*l*) Liv. 3, tit. 8, Du Jet. art. 13. See also liv. 2, art. 12, Du Capitaine. See also the Consolato del Mare, 183, and Code de Com. art. 421; Emerigon, c. 12, s. 42.

(*m*) So proved in the case of *Meyer and Others v. Vander Deyl*, Guildhall Sit. before Lord Ellenborough, Dec. 1803; *Backhouse v. Ripley*; *Park on Insurance*, 26. "It is accordingly," says Mr Phillips, "the practice in respect to whaling voyages, to adjust on the prin-

ciples of general average, the loss of oil thrown overboard from the deck, where it is carried for a short time, after being put into casks, before it can be properly and safely stowed in the hold."—*Treatise on Insurance*, vol. 1, p. 333.

(*n*) *Da Costa v. Edmunds*, 4 Campb. 142; *Gould v. Oliver*, 4 Bing. N. C. 134. *

(*o*) Dig. 14, 2, 2, 3; *Hicks v. Paling-ton*, Moore, 297; *Wellwood*, tit. 18.

the Third (o), the ransom of any ship or merchandize on board the same, belonging to any subject of this country, and taken by "the subjects of any state at war with his Majesty, or by any persons committing hostilities against his Majesty's subjects," was absolutely prohibited; and by a statute made at the commencement of the late war (p), such ransom was prohibited, "unless in the case of extreme necessity to be allowed by the Court of Admiralty;" and all contracts for ransom contrary to those statutes were made void; and the person entering into such contract subjected to a penalty of *five hundred pounds* (q).

And not only may the loss of goods become the subject of general contribution, but also, in some cases, the expense incurred in relation to them. Thus, where a ship went into port in distress and wanting repairs, it became necessary to take out the cargo; and there being no warehouses at hand, it was put on board other vessels, Lord *Stowell* said, that as the unloading the goods was for the common benefit of all, it being necessary to unload the ship for the preservation of the cargo, as well as for its own repair, the expense incurred by it must be considered as general average (r). Thus, if it be necessary to unlade the goods, in order to repair the damage done to a ship by tempest, or by collision with another vessel, so as to enable her to prosecute and complete her voyage, it has been held (s), that the expense of unlading, warehousing, and re-shipping the goods should be sustained by general contribution, because all persons are interested in the execution of the measures necessary to the completion of the voyage.

The rule mentions goods only, but its principle extends to the ship and its furniture; and all that I have hitherto said respecting the goods is to be understood also of the provisions, the guns, the

(o) 22 Geo. 3, c. 25. This statute is not limited as to time, yet the 37th and two following clauses of the 33 Geo. 3, c. 66, contained the same prohibition, &c., of ransom, and the latter statute was made to continue only during the last war with France.

(p) 43 Geo. 3, c. 160, s. 34 and 35; 45 Geo. 3, c. 72, s. 16, 17.

(q) In consequence of this illegality, if the master ransom his ship, and bring her to England, the owner may take her from him without paying the price. *Parsons v.*

Scott, 2 Taunt. 363. And if the master, to enable himself to pay the ransom, borrow money of a person acting with him in the transaction, he cannot be compelled to repay it. *Webb v. Brooke*, 3 Taunt. 6.

(r) *The Copenhagen*, 1 Rob. Ad. Rep. 289; *Da Costa v. Newnham*, 2 Term Rep. 407, also the *Gratitudine*, 3 Rob. Ad. Rep. 257, where this seems admitted.

(s) *Plummer v. Wildman*, 3 M. & S. 482.

boat or other tackle of the ship: *a fortiori*, it is also to be understood of goods belonging to the owner or master of the ship, as well as of those belonging to the merchant. *Emerigon* illustrates the case of the *boat* by the relation of a stratagem, practised by one of his own countrymen. The master of a *French* vessel, having been pursued for several hours by two frigates, and having also his flight intercepted by the appearance of two other vessels a-head, hoisted, as soon as it became dark, his boat into the sea, furnished with a mast and sail, and a lanthorn at the mast-head, and then changed his course and sailed during the whole night without any light on board his own ship; in the morning no enemy was in sight. The value of the boat thus abandoned was made good by general contribution (*t*). And it has been decided by the Court of Common Pleas, that the shippers of goods were liable to contribution for stores necessarily and by the advice of the mate thrown overboard, after the ship was captured, and while in possession of the enemy; for the capture, without condemnation, did not divest the property of the owners while a *spes recuperandi* remained (*u*).

But the jettison must be for the purpose of escape, or of saving the ship and cargo, by lightening her and increasing her speed; and so, when the captain of a vessel, in order to prevent a quantity of dollars from falling into the hands of an enemy, by whom he was about to be attacked, threw them into the sea, and was immediately captured, the loss was considered not to be a general average (*v*).

5. If sails are blown away, or masts or cables broken by the violence of the wind, the owner must alone bear the loss (*w*). The broken tools of an artificer bring no charge upon his employer.

A ship had struck to a privateer, who, the wind blowing fresh at the time, was unable to board his prize. The merchantman, by hoisting an extraordinary press of sail, effected her escape; but in so doing, was much strained and otherwise injured, and had her main-mast carried away. The damage so done was held not to be general average, for the loss was a common sea risk. The master did no more than his strict duty to his owners in endeavouring to escape, and no sacrifice was made for the benefit of the cargo (*x*).

(*t*) *Emerigon*, tom. 1, p. 622.

(*u*) *Price v. Noble*, 4 Taunt. 123.

(*v*) *Butler v. Wildman*, 3 B. & Ald. 398.

(*w*) *Digest*, 14, 2, 2.

(*x*) *Covington v. Roberts*, 2 New Rep.

378.

And the decision was the same in respect of damage occasioned to a ship and her tackle, by standing out to sea with a press of sail in tempestuous weather, to avoid the impending peril of being driven on shore and stranded (y).

Upon the same principles was decided the case of *Taylor v. Curtis* (z), by the Court of Common Pleas. The ship *Hibernia* sailed on a voyage, under the protection of convoy. In consequence of a hurricane, she was separated from the convoy, and fell in with an *American* privateer. The captain, seeing no prospect of escape, resolved on resistance. The *Hibernia* mounted only six guns, and her crew consisted of twenty-two men. The *American* had twenty-two guns, and one hundred and twenty-five men. The fight was gallantly maintained; and after a conflict of eleven hours, in which the hull and rigging of the *Hibernia* were greatly damaged, one of her crew killed, and some wounded, she succeeded in beating off the privateer. The *Hibernia* arrived at *St. Thomas's* almost a wreck, and delivered her cargo to the consignees. The value of the entire cargo was 21,092*l.*; the damage and expense to the shipowners, including medicines and surgical aid for the wounded, was 2908*l.*, which they claimed in this action as general average. But the Court felt bound to refuse the claim; and Chief Justice *Gibbs* said, "The losses for which the plaintiffs seek to recover this contribution are of three descriptions: 1. The damage sustained by the hull and rigging of the vessel, and the cost of her repairs. 2. The expense of the cure of the wounds received by the crew in defending the vessel. 3. The expenditure of powder and shot in the engagement. The measure of resisting the privateer was for the general benefit; but it was a part of the adventure. No particular part of the property was voluntarily sacrificed for the protection of the rest. The losses fell where the fortune of war cast them, and there, it seems to me, they ought to rest."

But if the master, compelled by necessity, cut his cable from the anchor to use it as a hawser, or if he cut away or abandon his masts, sails, or cables, to lighten and preserve the ship, their value must be made good by contribution (a).

(y) *Power v. Whitmore*, 4 M. & S. 141.

(z) 6 Taunt. 608. But see upon this case, *Phillips on Insurance*, vol. 1, p. 337, and *Benecke on Insurance*, p. 280.

(a) *Marshall v. Dutrey*, *Select Cases of Evidence*, p. 58; Dig. 14, 2, 3, and 5; *Ordon. Avaries*, art. 2; *Code de Com.* art. 400, num. 3 and 4.

The ship *Argo*, laden with wheat, as she was entering *Sunderland* harbour with a fair wind, was encountered by a squall so sudden and violent, that her crew were obliged to let go the small bower anchor to bring her up. With the assistance of some men who came to her for that purpose in a pilot-boat, they fastened the ship, in order to secure and preserve her and her cargo from the storm, with a warp, which they for that purpose got run out and fastened round the pier. The warp soon broke, and the ship then drifted along the pier, and was made fast with hawser ends and towing lines, being proper and usual ropes for that purpose. The danger increasing, the master cut the cable of his best bower anchor, to fasten her still more securely to the pier; and by this means saved her, in all probability, from going adrift and sinking upon the bar at the entrance of the harbour. Lord *Kenyon* and the Court of King's Bench held, that all ordinary losses and damage sustained by the ship, happening immediately from the storm or perils of the sea, must be borne by the shipowners; but articles made use of by the master and crew upon the particular emergency, and out of the usual course, for the benefit of the whole concern, must be paid proportionably, as general average; and such the use of the cable was considered to be (a).

In like manner (b), the damage voluntarily done to a ship by cutting its deck or sides, in order to facilitate a necessary jettison, and also the pilotage, port duties, and other charges incurred by taking a ship into a port to avoid an impending peril, and the expense of extraordinary assistance (c) to preserve and secure a ship from the violence of a storm at its entrance into the port of destination, are to be sustained by a general contribution.

6. § With respect to stranding: if the master, to avoid the danger of storm or capture, run his ship on a rock, shallow, or strand, and the ship be afterwards got off, the damage, thus voluntarily done to both ship and cargo, and the expense of recovering (d) and unlading her, and the value of the goods thrown overboard to enable her to float, and so continue her voyage for the benefit of all concerned, are properly general average. But if the strand-

(a) *Birkley v. Presgrove*, 1 East, 220.

(b) *Covington v. Roberts*, 2 New Rep. 87.

(c) *Birkley v. Presgrove*, 1 East, 220.

(d) *Laws of Wisbuy*, art. 55; *Molloy*,

book 2, chap. 6, sect. 15, and see also

Beawes, p. 165, and *Wellwood*, tit. 20.

ing be the result of the ordinary perils of the sea, without any sacrifice on the part of the master, the expenses incurred must fall upon the ship alone. *Benecke* (e) illustrates this distinction by a case which happened within his experience. A vessel, on her voyage from *London* to *Hamburgh*, was driven by a high tide on a piece of ground called the *Grassbrock*, very near the latter port. The cargo was unladen, not with a view to set the vessel afloat, but for delivery to the consignees; and the ship was dug out. The vessel in this case could not be called upon to contribute to the unloading, although she was accidentally benefited by it; and there was no ground for contribution by the owners of the cargo, to the expense of digging her out, because that was done for her own benefit, it being of no consequence to the consignees whether she were floated or not. In this case it will be observed, that the damage was the result of no voluntary sacrifice; the expenses were incurred for no common object; it was not, therefore, in its nature general average. The rule would therefore seem to be, that if the stranding be voluntary, to save the ship and cargo, the damage done to the ship becomes a general average; but if it be involuntary, and the cargo be saved, in whole or in part, no general average is due (f).

But, supposing the cargo to be saved, and the vessel totally lost by such voluntary stranding, are the rescued goods to contribute for the ship? Upon this subject great diversity of opinion exists among foreign jurists. The question does not appear to have ever directly arisen in our courts; and although some *English* writers (g) on the marine law have determined it in the negative, their opinion has not obtained a general or unqualified concurrence.

There are few points of maritime jurisprudence on which an *English* lawyer will fail to find a reference to the *American* authorities useful and instructive, but on this, the most learned judges have differed, and no rule can be said to be finally established and received. In this dearth of positive authority, the only satisfactory course is to discuss the question upon principle, and to seek a solution of the doubts which a variety of opinions and regulations has created, in the letter or the spirit of the *Rhodian* law. That the

(e) *Benecke*, p. 215.

(f) *American Edition*, in notis, p.

349.—*Story*.

(g) *Beawes*, tit. *Salvage*; *Malynes*,

110; *Molloy*, book 2, chap. 6, sect. 12; *Marsh*. 537, 538.

cargo rescued from a vessel honestly stranded and wrecked should be free from contribution to the loss of the shipowners, seems at first view to savour of injustice. But a voluntary sacrifice of the property of one for the good of all, is the foundation of the whole system of average. *Omnium contributione sarciatur quod pro omnibus datum est. Æquissimum enim est commune detrimentum fieri eorum, qui propter amissas res aliorum consecuti sunt ut merces suas salvas habuerunt* (h). In the simplest illustration of the rule, the case of jettison, unless the goods were voluntarily *given* for the common safety, there is no contribution. So, in case of capture, goods must be *given*, not taken, to found a contribution for ransom. If contribution be claimed for a mast or a cable cut, they must have been *given* for the safety of all. Repairs must fall upon the owner, unless the damage was submitted to and *given* for the common good, or the cost of reparation incurred for the sake of the cargo alone. In the case of a total wreck, consequent upon a voluntary stranding, can the ship be said to have been deliberately sacrificed? In the great majority of cases, certainly not. A vessel is not stranded for the purpose of destruction; that course is resorted to with the intention and in the hope of saving her from more imminent peril. The sacrifice really intended to be made is, in most cases, the cost of the damage which may be expected from the stranding, and the expense of getting the vessel off: the total loss is occasioned by circumstances, which were not foreseen when the stranding was determined on. Accordingly, we read in the *Roman* text, *Amissæ navis damnum collationis consortio non sarcitur per eos qui merces suas naufragio liberaverunt, nam hujus æquitatem tunc admitti placuit, cum jactus remedio cæteris in communi periculo salva navi consultum est* (de lege Rhodiâ). *Emerigon* also expressly tells us, that the damages resulting from the stranding of the ship, if the stranding be done voluntarily for the common safety, are general average, provided always that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is "save who can" (i). *Valin* (j), *Cleirac* (k), *Roccus* (l), are all of the same opinion.

(A) Digest, 14, 2, 5.

(i) *Emerigon*, tom. 1, p. 614, 616.(j) *Com. sur l'Ordonnance*, tit. Ava.

ries, art. 6, tit. Contribution, art. 15, 16.

(k) *Jugemens d'Oleron*, p. 42.(l) *De Navibus et Naulo*, not. 60.

Bynkershoek, on the other hand, cites and disapproves (m) of a decision of the maritime judges of *Amsterdam*, in which they held that there is to be no contribution unless the ship voluntarily run ashore be saved. *Voet* (n) also, in his commentaries on the *Roman* law, admits contribution in the case of a ship run ashore for the preservation of the cargo, and the ship lost. Mr. Justice *Story*, referring to the conflicting decisions of the *American* Courts, declines to pronounce between them (o).

When the question shall arise in our Courts, it were presumptuous to predict, with confidence, what rule will be adopted by them. Probably it may be thought necessary to inquire what the intention of the master was in running the ship ashore. The reader will consider what has been offered in conformity with the judgment of the Supreme Court of *New York*, delivered in a recent case (p), by Chief Justice *Kent*, and in support of the doctrine of the *English* text-writers. as merely suggested for the consideration of the learned. §

(m) *Questiones*, Jur. Priv. lib. 4, c. 24.

(n) *Comm. ad Pand. lib. 14, tit. 2, sect. 5.*

(o) *Notes to American edition*, p. 349.

(p) *Bradhurst v. Colombian Insurance Company*, 9 *Johnson's Rep.* 9; but see *contrà*, *Gray v. Waln*, 2 *Serg. & Rawl.* 220, and *Caze v. Reilly*, 3. *Washington Circuit Rep.* 298. Yet the principles which govern the American courts on questions of general average are the same as in our law. Thus the American ship *Prudence*, while waiting at *Gibraltar* for a wind to proceed on her voyage to *Cadiz*, encountered a violent gale, which caused her to start her anchors, and was driving her stern foremost on a reef of rocks. The jib was hoisted to make her lay round, with the intention of putting to sea, but the sheet having parted, this was found impracticable, and they were obliged to haul it down, upon which the vessel became ungovernable. The master then cut the cable and put the helm hard up, in order to put her ashore in the best place for the preservation of the vessel and cargo, and of the lives of the crew. She struck on the *Ragged Staff*, about a quarter of a mile from the place where she would have grounded had not the cables been cut, and she soon bilged, and every thing in

the vessel was in a short time afloat, both fore and aft. On the next day, the masts were cut away to prevent their working through the bottom. On the second day after the schooner went aground, the gale having abated, lighters were employed to save a part of the cargo. The schooner could not be got off and repaired without incurring an expense much exceeding her value when repaired. In a suit on a policy, a total loss was claimed. Mr. Justice *Gibson* delivered the opinion of the Court. "This undoubtedly gives a claim for general average for the cables, and anchors, and masts, but for nothing else, as nothing else was deliberately sacrificed. An accidental loss that happens in endeavouring to bring about a very different event, is not the subject of compensation; and such would be the casualty of stranding in endeavouring to get out to sea. It is necessary that the loss should arise from the direct agency of some one acting for the general benefit. There must be a deliberate intention to sacrifice the thing at all events, or at least, to put it in a situation in which the danger of eventual destruction would be increased." *Walker v. The United States Insurance Company*, 11 *Serg. & Rawl.* 61.

7. The expense incurred in a port, in which the ship may have taken refuge during the voyage, by repairing the damage done to the ship by tempest alone, seems with propriety to fall upon the owners, and is so held in the civil law (*q*) and by many foreign writers. And although the decision of the Court of King's Bench in the case of *Da Costa v. Newnham* (*r*), has been considered as an authority for a contrary doctrine, yet, in my humble judgment, the facts upon which that decision was founded, do not warrant such a conclusion.

Upon this subject of the expenses of a ship taking refuge in a port, incurred in repairing the damage occasioned by tempest in order to prosecute and complete the voyage, and the wages and maintenance of the crew, during the delay thus necessarily submitted to for the attainment of this object, reasonable doubts have been entertained, and the decisions which will be presently considered have failed entirely to remove them. * If the damage to be repaired, be in itself an object of contribution, it seems reasonable that all expenses necessary, although collateral to the reparation, should also be objects of contribution, the accessory should follow the nature of it's principal. On the other hand, if the damage itself be not such as to be the object of contribution, by the same rule, neither ought the collateral expenses incurred with regard to the repairs to become so. In answer to this it is urged, that as the repairs are necessary to the completion of the voyage, in the attainment whereof all are interested, all ought to contribute to the expense of this necessary delay. But it should be remembered, that it is the duty of the owners not only to provide a stout and sufficient ship at the commencement of the voyage, but also, as far as in them lies, to maintain the ship in a perfect condition during the whole course of the voyage, and almost every charter-party contains an express covenant to this effect. If, indeed, the ship be not worth all the charges of repairs as well direct as collateral, a consideration wholly different may take place (*s*), but assuming the ship to be worth the expense,

(*q*) Dig. 14, 2, 6 ; Emerigon, tom. 1, p. 625 ; Benecke on Insurance, chap. 5, on Average, p. 199.

(*r*) 2 Term Rep. p. 407.

(*) The observations in the text from the * to the end of the paragraph, are

Lord Tenterden's. They will be found in the 4th edition of this work, p. 361.

(*s*) See Lord Stowell's judgment in the case of the *Gratitudine*, 3 Rob. Ad. Rep. 257.

why should the merchant be charged in any shape towards the performance of a duty incumbent on the owner? What is here offered as to wages and maintenance, may apply also to port charges and other duties of the like nature incurred on the same account, and also to the value of a part of the cargo that may happen to be sold by the master to defray the expense of the repairs.*

There is indeed a decision of the Court of King's Bench, upon the construction of a charter-party which may properly be mentioned in this place. A ship chartered for a voyage to the *East Indies* and back, sprung a leak at sea on her return home, in consequence of which it became necessary to put into the *Cape of Good Hope*, and there take out the cargo in order to repair the ship. The ship being repaired and reladen, returned home in safety, and the owners claimed from the freighter a payment in the nature of general average towards the expense of the repairs, the maintenance of the crew and other charges connected with the repairs. But the Court considering the import of several clauses of the charter-party to be, that the owners should keep the ship in repair during the whole voyage at their own expense, and being also of opinion that the expressions used in another clause tended to show that the defendant was to be liable to general average in the case of jettison alone, held upon the construction of this charter-party, that the plaintiff was not entitled to recover anything for the expenses thus incurred at the *Cape* (t).

Yet in one case (*Plummer v. Wildman*) (u) decided in the Court of King's Bench, since the foregoing observations were written, where the master of a ship was under the necessity of cutting away part of his rigging, in consequence of collision with another vessel that was driven against him in a storm, and of returning to the place of his departure to repair the damage occasioned by the collision, and of unloading his cargo there for the purpose of such repairs, it was held that the expense of so much of the repair as was *absolutely necessary to the performance of the voyage*, including the necessary expense of unloading, should be made good by a general average. This was an action by the owners of the ship *Cambridge* against the freighters, to recover contribu-

(t) *Jackson and Another v. Charnock*,
8 Term Rep. in K. B. 209.

(u) 3 Maule & Selwyn, 482.

tion to a general average under the following circumstances, The ship sailed with a cargo of sugar and rum from *Kingston* in *Jamaica* to *London*. In the course of the voyage, a brig was unavoidably driven against her by the violence of the wind and sea, by which accident, her stern and knees were broken, and the master was in consequence obliged to cut away part of the rigging, and to return to *Kingston*, to repair the damage sustained by the collision and the cutting away. The ship could not have prosecuted her voyage, nor could she have kept the sea with safety without returning and repairing. Upon her return, the cargo was necessarily relanded and warehoused, in order that such temporary repairs might be done, as would enable her to prosecute her voyage. Upon the return of the vessel to *London*, the owners made a demand upon the freighter for his share of general average, including in such demand the expense of pilotage into *Kingston*, his own expenses in port, the expense of procuring mariners to replace deserters, the surveyor's bill for ascertaining the damage, the cost of loading and unloading the cargo, the wages and provisions of the crew, and the amount of repairs. Lord *Ellenborough*, said, "If the return to port was necessary for the general safety of the whole concern, the expenses unavoidably incurred by such necessity might be considered as a general average. It is not so much a question whether the first cause of the damage was owing to this or that accident, to the violence of the elements, or the collision of another ship, as whether the effect produced was such as to incapacitate the ship, without endangering the whole concern, from further prosecuting her voyage unless she returned to port and removed the impediment. As far as removing the incapacity is concerned, all are equally benefited by it, and therefore it seems reasonable that all should contribute towards the expenses of it, but if any benefit *ultra* the mere removal of this incapacity should have accrued to the ship by the repairs done, inasmuch as that will redound to the particular benefit of the shipowner only, it will not come under the head of general average; but that will be a matter of calculation upon the adjustment. The amount of the expenses of repairing to be placed to the account of general contribution, must be strictly confined to the necessity of the case, to the enabling the ship with her cargo to prosecute the voyage. As to the charge for the captain's expenses, during the unloading, repairing, and reloading, the shipowner must bear the captain's expenses in port,

and crimpage must be disallowed, it does not come under general average." Mr. Justice *Bayley*, said, "I doubt whether the repair of any particular damage can be placed to the account of general average, inasmuch as it is a benefit done to the ship, and if the captain could make it a general average by putting into port to repair, it would always be his interest to endeavour to do so. If, however, the repairs were merely such as were necessary to enable the ship to prosecute her voyage home; and were afterwards of no benefit to the ship, such repairs, I think, would properly come under a general average. Therefore deducting a benefit, if any, which "still results" to the ship from such repair, the rest may be placed to the account of general average."

§ Upon this decision it has been observed that repairs done to a vessel are always a benefit to her, and doubted whether, according to the above distinction, any part of those repairs which in themselves are of the nature of a particular average could ever be construed into a general average (*v*); but the justice of this criticism cannot be admitted. It is to a *lasting* benefit that Lord *Ellenborough's* exception applies, and Mr. Justice *Bayley* carefully distinguishes between repairs, which are afterwards of no benefit to the ship, and those from which benefit *still result* to it, both expressly confining the admission of repairs under general average, to such only as are temporary in their nature and necessary to the prosecution of the voyage.

The case of *Power v. Whitmore* (*w*) which was determined shortly after the one last cited, was an action on a policy of assurance on goods in which the merchant sought to recover from the underwriters a sum of money, which he had been compelled by a Court in *Portugal* to pay by way of general average, and contribution to the expense incurred by a captain in wages, provisions, and repairs under the following circumstances.

The ship sailed with the goods from *London* upon her voyage, encountered strong and adverse winds, and it was discovered, while still in sight of the *English* coast, that the bowsprit bitts had given way, occasioned by the heavy labouring of the ship then under her courses, beating to windward in a most heavy and dangerous sea. The master being apprehensive that the ship, if she continued in that situation, would be in great danger, judged

(*v*) Benecke, chap. 5, p. 197.

(*w*) 4 Maule & Selwyn, 141.

it prudent, after having consulted with his officers, to put into port, for the purpose of securing the bowsprit, and accordingly brought his ship to anchor in *Cowes* roads. All the damage was occasioned by the tempestuous winds and weather, and heavy seas, and the putting into *Cowes* was a prudent and proper measure, necessary for the safety of ship and cargo. The question was, if the plaintiff could recover his contribution to the amount expended for wages and provisions during the stay at *Cowes*, for the purpose of repair, as general average. Lord *Ellenborough*, said, "general average must lay its foundation in a sacrifice of part for the sake of the rest, but here was no sacrifice of any part by the master, but only of his time and patience, and the damage incurred was by the violence of the wind and weather. This is not like the case recently before the Court where the master was compelled to cut away his rigging in order to preserve the ship, and afterwards put into port to repair that which he sacrificed."

It seems to result from these decisions, that if a vessel goes into port in consequence of an injury which is itself the subject of general average, such repairs as are absolutely necessary to enable her to prosecute her voyage, and the necessary expenses of port charges, wages, and provisions during the stay, are to be considered as general average; but if the damage was incurred by the mere violence of the wind and weather, without sacrifice on the part of the owners for the benefit of all concerned, it falls, with the expenses consequent upon it, within the contract of the shipowner, "to keep his vessel tight, staunch, and strong," during the voyage for which she is hired.

The modern laws of foreign countries differ so much upon this subject, and have, for the most part, deviated so widely from the principles established by these decisions, that reference to them will be found by the *English* lawyer to result rather in curious than useful investigation. In *America*, the rule is stated by Mr. Justice *Story* (x) to be definitively settled in the principal commercial states, that whatever be the nature of the injury, whether arising from a voluntary sacrifice or a mere peril of the sea, the wages and provisions of the crew from the time of putting away for the port, the expense of loading and unloading, and every other expense necessarily incurred during the detention for the benefit of all concerned, are to come under general average.

(x) American Edition, p. 350.

That learned judge says, that the reasoning of the *American* courts follows out the doctrine of Lord *Ellenborough* in the case of *Plummer v. Wildman*. But what fell from the judges in that case must be understood with reference to the circumstances of the claim before them, and does not seem to countenance the rule which the *American* courts, conforming, in this respect, to the practice and the positive constitutions of some foreign countries, appear to have adopted.

8. We have seen, in a former part of this work, that a master may, under certain circumstances, borrow money on the security of his ship, or of its cargo; and that, if his vessel be disabled by the perils of the sea from carrying her cargo to its destination, he may, if he think proper, hire another vessel for that purpose. But, supposing him to be unable to raise money on bottomry, or by hypothecation of the cargo, that no other vessel can be obtained, and that his own is reduced to such a state as would not justify his incurring the cost of her repair, is he not at liberty to sell some part of the property entrusted to him, to enable him, by repairing his ship, to carry the remainder to its destination? And if he do so for the benefit of the owners of the cargo, is not such sacrifice the proper subject of a general average? Lord *Stowell*, in the case of the *Gratitude*, has determined that it may, and his decision has met with general concurrence (x). §

9. With respect also to the wages and maintenance of the crew during the detention of a ship by the orders of a sovereign power, contradictory opinions are to be found in the works of writers on this subject (y). Some authors have taken a distinction between the case of an embargo in the lading port, and the arrest and detention of a ship during the course of the voyage. The *French* Ordinance provides for the latter case, by declaring, that if the ship be hired by the *month*, the charges shall be reputed general average; but if hired for the *voyage*, the owners alone shall bear them (z). The reason of this regulation is not easily discernible (a), and it is in express contradiction to the spirit of another article of the same Ordinance on the subject of freight (b). In the case of

(x) 3 Rob. Ad. Rep. 255.

(y) Emerigon, tom. 1, p. 631; Beawes, 165.

(z) Liv. 3, tit. 7; Des Avaries, art. 7; Code de Com. art. 400, num. 6, and

403, num. 4.

(a) But see Pothier, Charte-Parte, num. 85; Emerigon, tom. 1, p. 539.

(b) Liv. 3, tit. 3, Du Frct. art. 16.

Da Costa v. Newnham (c), Mr. Justice *Buller*, speaking of this expense of wages and provisions during the detention of a ship by embargo, says, "the Court has said that these charges shall fall upon the owners only, and the freight must bear them." And this case does not seem to fall within the principle of the *Rhodian* law, because here the delay does not proceed from the act of the master or persons belonging to the ship; nor is it for the general benefit.

A ship having met with tempestuous weather on her voyage from *Hull* to *St. Petersburg*, was obliged to put into *Copenhagen* to unload and repair; the expenses of which repair, as well as the *Sound* dues, were paid by the owner's agent at *Copenhagen*. It being impossible to negotiate bills on *England*, for the purpose of re-paying to the agent the sums he had disbursed for the ship's use, the agent caused the captain to be arrested, by process from the maritime court of justice at *Copenhagen*. In this situation, the captain, to procure his liberation and to prosecute his voyage, sold a portion of the cargo, the proprietor of which brought an action against another shipper for contribution. "Had the ship," said Lord *Ellenborough*, "been seized for non-payment of the *Sound* dues, I should have thought that the sale of a part of the cargo to pay them, in the absence of all other means to raise money for that purpose, might have been the foundation of a claim for general average. But these dues had been paid by the ship's agent, and the money so paid merely constituted a private debt due to him. I do not think that any part of the plaintiff's goods was sacrificed for the safety of the ship and the residue of the cargo, in such a manner as to give them a right to a contribution from the other shippers of goods on board. Their proper remedy is against the owner of the ship" (d).

10. For the additional expense of the wages and maintenance of the crew incurred while a ship has been waiting for convoy, general contribution has sometimes been claimed; and three decisions of the different courts in *Holland* on this subject are related by *Bynkershoek* (e), which seem worthy of notice in this place.

(c) 2 Term Rep. in K. B. p. 407. This was an action brought against the insurers of a ship, by the owner, who had offered to abandon to them, and had a right to insist upon doing so, but had re-

luctantly consented to the repairs at their instance.

(d) *Dobson v. Wilson*, 3 Campb. 480.

(e) *Bynkershoek*, *Questiones Juris Privati*, lib. 4, c. 25.

In the first case, the master of a general ship, which was armed, and had letters of marque, and was bound to several *Italian* ports, during a war between the *Dutch* and *French*, gave public notice of his intention to receive goods, and to sail for those ports without the company of other ships. Having received a cargo, he set sail under convoy of a ship of war destined for *Portsmouth*, entered with her the harbour of that place, and there waited a whole year for another convoy, under which he sailed to *Cadix*; and there waited a second year for a third convoy, under which he sailed to *Italy*, and delivered his cargo there. Under these circumstances, the master sued the merchants for general average, and obtained a decree in his favour, which was confirmed by one court of appeal, reversed by a second, and at last finally affirmed by the senate, of which the learned author was then a member; against his opinion, and against the general principles of law on this subject, and against the particular engagement made by the master on this occasion. This judgment appears to have been disapproved of in *Holland*; for, in another case, which happened soon afterwards, where five *Dutch* vessels coming from *Surinam*, and learning on their voyage that a war had broken out between the *Dutch* and *French*, put into *Plymouth*, and there waited for convoy; which case also went through all the same tribunals, the senate decreed against the claim of contribution. A *third* case happened soon afterwards, in which the same four courts successively decreed in favour of the claim (f). But of this the circumstances were very different from the two former, and such as seem to warrant the judgments pronounced in it. It was the case of a ship freighted from *Amsterdam* to *Cadix*, with a stipulation to sail with convoy either to that place or as far as *Lisbon*. The ship accordingly sailed under convoy of a man of war, in company with several other vessels, and when she came near *Lisbon*, fell in with a fleet of privateers, by which some of the other vessels were captured, and the ship in question put into *Lisbon*, in obedience to a signal from the man of war, and there waited six months before she could safely proceed to *Cadix*. In this case

(f) For the sake of those who complain of delay in the administration of justice in this country, it may be proper to mention, that in the last of these three foreign cases, a period of nearly seven

years elapsed between the first and the last sentence; in the second, a period of nearly ten years, and in the first of almost sixteen years.

it is to be observed, that the master put into port to avoid an extraordinary and impending peril, and not merely as a matter of general caution to avoid the ordinary dangers always accompanying a state of warfare. And the expense thus incurred appears perfectly analogous to the cases of jettison, and to fall within the principle of the *Rhodian* law. For in this case, as the learned author observes, it is clear that there was a present and impending peril; and it is clear, also, that the voyage was delayed, not by any accident, but by design, in order to avoid the peril.

11. The ordinance of the *Hanse-Towns* also mentions as an object of general average the expense of healing mariners wounded in the defence of the ship against the attack of pirates (*g*): I have already mentioned the provisions made by the legislature of this country, for persons of this description (*h*). On the expense of repairing the injury done to a ship during a combat, foreign writers differ in opinion (*i*). In the *Guidon*, an injury done to the cargo by the shot of cannon is said to be a charge upon the merchant only (*j*). In *England*, it has been decided that neither the damage to a ship, nor the ammunition expended, nor the expense of healing sailors, wounded in an action with an enemy, is an item of general average. The latter item, however, is made so by the Code de Commerce (*k*).

12. By the law of most of the continental nations of *Europe*, the injury done by one ship to another, or to its cargo, without fault in the persons belonging to either ship, is to be equally borne by the owners of the two vessels (*l*); and this doctrine is advanced by many foreign writers; it therefore becomes necessary to observe here, that by the law of *England*, in the case of damage happening in this manner either to ship or cargo, by mere misfortune and without fault in any one, the proprietors of the ship or cargo injured must bear their own loss (*m*). I have already mentioned that such a misfortune is considered as a peril of the sea.

(*g*) Art. 35.

(*h*) Part 2, chap. 6, sect. 1.

(*i*) 2 Valin, 168; Pothier traité des Avaries, sect. 2, num. 144 and 154; Emerigon, tom. 1, p. 628.

(*j*) Chap. 5, art. 4.

(*k*) Taylor and Others v. Curtis, 2 Marsh. 309, and 6 Taunt. 608; Code de Com. art. 400, num. 6

(*l*) Ordin. of Oleron, art. 14 of Wis-

buy, art. 26, 50, 67 and 70; French Ordin. liv. 3, tit. 7; Des Avaries, art. 11, and Valin thereon, and Bynkershoek, Quest. Jur. Priv. lib. 4, chap. 18, 19, 20 and 21. But the law of France appears to have been altered in this respect by the Code de Com. art. 407. See ante, p. 201.

(*m*) See the case of Buller v. Fisher, ante, chap. 5, of this part, sect. 2.

And in this respect, the law of *England* agrees with the Civil Law (*n*). .

13. Hitherto we have considered the losses, which are to be compensated by general contribution, as being the price of safety, but this is not to be understood of absolute and perfect safety, by arrival and delivery at the port of destination. If temporary safety be obtained by the loss ; if the ship survive the storm, or escape the enemy, and be afterwards cast away by another tempest, and goods be saved from the wreck, the clear value of the goods so saved must be contributory to the original loss, because without that loss, even this diminished value would have had no existence (*o*).

The abandonment of goods on these occasions, although it be the act of man, is not considered to be so far voluntary as to divest the property of the merchant, and give a title to any person who may find and save them : but from such person the merchant may reclaim them on payment of salvage (*p*) : and if he is able to do so, their clear value is to be deducted from the contribution, or paid to the contributors. .

It has been observed in a preceding part of this Treatise (*q*), that when an entire ship is taken to freight by a merchant, the master must not take on board the goods of other persons without his consent : from whence, I apprehend, it will follow that if goods so wrongfully shipped be afterwards cast overboard to lighten the vessel, the merchant freighter ought not to contribute to the loss.

14. In the SECOND place, let us consider the articles that are to contribute to make good these losses. And these are all merchandize conveyed in the ship for the purposes of traffic, whether belonging to merchants, to passengers, to the owner, or to the master, of whatever kind, and however small be their weight (*r*) in comparison to their value (*s*). For the contribution is made not on account of incumbrance to the ship, but of safety obtained.

(*n*) Dig. 9, 2, 29.

(*o*) Dig. 14, 2, 4, 1 ; Vinnius in *Peckium*, p. 246, 250.

(*p*) Dig. 14, 2, 2, 8, and 14, 2, 8. In *Tucker v. Cappel*, 2 Roll. Rep. 498. Mr. Justice Dodderidge said the proprietor of the goods may bring an action of trover against the finder.

(*q*) Ante. chap. 1 of this part. See

Ordin. of Wisbuy, art. 46.

(*r*) Dig. 14, 2, 2, 2 ; 1 *Magens*, p. 62, 63 ; *Emerigon*, tom. 1, p. 639.

(*s*) Lord Kaim admits this rule, but controverts its propriety, and contends that the contribution should be according to weight and not value. *Principles of Equity*, p. 116. I cannot think his arguments satisfactory.

Therefore, in this country, bullion and jewels contribute according to their full value (*t*).

For slaves, also, who were considered as a species of merchandise, their proprietors formerly contributed according to their value (*u*); although this dreadful traffic had not extended so far as to authorize the casting of these unhappy persons into the sea, and making their loss an object of contribution (*v*). But as no estimation can be made of the value of the life of a freeman, neither passengers nor crew are to contribute for their personal safety (*w*). Neither in this country do the wearing apparel, jewels, or other things belonging to the persons of passengers, or crew, and taken on board for their private use, and not for traffic, contribute on these occasions (*x*). And *Emerigon* informs us that the same practice prevails in *France*, although the Ordinance of that country has not exempted these articles (*y*). Both the ship and the freight gained in the voyage are now every where contributory, although formerly, in some countries, contribution was made for the value of one only (*z*). But the owners do not contribute for the victuals or ammunition of the ship. In *France*, and many other of the continental states, contribution is made in some cases for the whole, in others for a moiety only, of the value of the ship and of the gross freight. In this country the owners contribute according to the value of the ship at the end of the voyage, and the clear amount of the freight or earnings of the voyage, after deducting the wages of the crew and other expenses of the voyage. And it was held that the freight should contribute in respect of a loss occurring on an outward voyage, in a case where a ship was chartered out and home, and the freight was payable according to the quantity of the homeward cargo, and upon the ship's safe arrival. The question arose in an action brought by the shipowner on a policy of insurance on the ship for the outward voyage. The insurers were allowed to deduct the amount of a general average on the freight. The ship had arrived in safety

(*t*) 1 *Magens*, p. 62, 63.

(*u*) *Dig.* 14, 2, 2, 2.

(*v*) *Emerigon*, tom. 1, p. 610, 646.

(*w*) *Dig.* 14, 2, 2, 2.

(*x*) 1 *Magens*, p. 62, 63. But by the Civil Law, the rule was otherwise, *Dig.* 14, 2, 2, 2, and a contrary rule is also laid down in the *Guidon*, chap. 5, art. 26,

upon which, however, *Cleirac* observes, that the ordinances of different states vary.

(*y*) *Tom.* 1, p. 645, &c.

(*z*) See the authorities cited by *Emerigon*, tom. 1, p. 648, &c., and *Ordin. of Wisbuy*, art. 40. It is still so by the *Code de Com.* art. 401.

in the *Thames* before the trial of the action (*a*). The mariners do not contribute for their wages, except in the single instance of the ransom of the ship (*b*). In this instance they are required to contribute in order to encourage resistance; in other instances they are exempted from contribution, lest the apprehension of personal loss should restrain them from the execution of the measures necessary to general safety; and the peril and extraordinary hardships endured by them on these disastrous occasions well entitle them to an exemption from further distress.

15. LASTLY, as to the mode of contribution. By the civil law, the goods cast overboard were valued only at their invoice price or prime cost (*c*). A practice formerly prevailed in this country to adopt this valuation, if the loss happened before half the voyage was performed; but, if it happened afterwards, then to value the goods at the clear price which they would have fetched at the place of destination (*d*); and this practice still exists in many places abroad (*e*). But here the last valuation is now adopted in all cases where the average is adjusted after the ship's arrival at the place of destination, and appears best to agree with the nature of the subject (*f*); for although, as between the proprietor and the insurer of goods, the prime cost is the only value, the contract of insurance in that case being a contract of indemnity against loss, and not a contract for the security of gain, yet in this case equity requires that the person, whose loss has procured the arrival of the ship at the place of destination, should be placed in the same situation with those whose property has arrived at that place; which can only be done by considering *his* goods as having arrived there also. But if the ship, in consequence of any misfortune, to be sustained by general average, be compelled to return to its lading port, and the average be immediately adjusted,

(*a*) *Williams v. London Insurance Company*, 1 M. & S. 318. See also the *Progress*, *Barker*, 1 Edwards, 210. The last point in the judgment of the Court, which relates to salvage on the freight upon recapture. But see also some sensible observations on the case of *Williams v. London Insurance Company*, in *Bencke*, p. 315, &c.

(*b*) *Emerigon*, tom. 1, p. 642; *French Ordin.* liv. 3, tit. 4; *Des Loyers des Matelots*, art. 20, and *Valin* thereon, who gives this construction to the word *omnes*

in the sentence "*si navis a piratis redempta sit, Servius Oñlius, Labeo, omnes contribuere, debere aiunt*," *Dig.* 14, 2, 2, 3.

(*c*) *Dig.* 14, 2, 2, 4.

(*d*) *Malyne*, p. 113, and *Molloy*, book 2, chap. 6, sect. 6; *Wellwood*, tit. 21.

(*e*) *Emerigon*, tom. 1, p. 654; *Vinnius in Peckium*, p. 220.

(*f*) It is also the rule of the *Ordin. of Winbury*, art. 39. And of the *Code de Com.* art. 402.

in this case the goods only contribute according to the invoice price, for the price of sale is unknown. And with regard to the loss of masts, cables, and other furniture of the ship, as the new articles purchased will in general be of greater value than the articles lost, it is usual to compound the difference by deducting one-third from the price of the new articles.

16. Supposing, therefore, a general average to be settled upon the ship's arrival at the port of destination, according to the principles before advanced, it is necessary, in the first place, to take an account of the several losses, which are to be made good by contribution: in the second place, to take another account of the value of all the articles that are to contribute; in which must be included the value of the goods, &c. thrown overboard, for otherwise the proprietors of those goods will receive their full value, and pay nothing towards the loss. But as this will be most easily understood by an example in figures, I propose the following case, wherein the reader will suppose that it became necessary in the *Downs*, to cut the cable of a ship destined for *Hull*; that the ship afterwards struck upon the *Goodwin*, which compelled the master to cut away his mast, and cast overboard part of the cargo, in which operation another part was injured; and that the ship, being cleared from the sands, was forced to take refuge in *Ramsgate* harbour, to avoid the further effects of the storm.

Amount of Losses.		Value of Articles to Contribute.	
Goods of A. cast overboard	- £500	Goods of A. cast overboard	- £ 500
Damage of the goods of B. by the jettison	- - - - - } 200	Sound value of the goods of B. deducting freight and charges	} 1000
Freight of the goods cast overboard	- - - - - } 100	Goods of C. - - - - -	500
Price of a new cable, anchor, and mast	- - - - - } 200	Of D. - - - - -	2000
Deduct one-third	- - - 100	Of E. - - - - -	5000
Expense of bringing the ship off the sands	- - - - - } 50	Value of the ship - - - - -	2000
Pilotage and port-duties going into the harbour and out, and commission to the agent who made the disbursements	- - - - - } 100	Clear freight, deducting wages, victuals, &c. (g) - - - - -	} 800
Expenses there	- - - - - 25	Total of contributory value	£11,800
Adjusting this average	- - - - - 4		
Postage	- - - - - 1		
Total of losses			
£1180			

(g) A writer of great practical experience, is of opinion that the value of the provisions should be deducted, not

from the freight, but from the original value of the ship. *Stevens on Average*, p. 62.

Then £11,800: £1180: £100: £10:

That is, each person will lose 10 per cent. upon the value of his interest in the cargo, ship, or freight.

Therefore A. loses	-	£ 50
B.	-	100
C.	-	50
D.	-	200
E.	-	500
The Owners	-	280

Total £1180, which is the exact amount of the losses.

Upon this calculation, the owners are to lose 280%; but they are to receive from the contribution 380% to make good their disbursements, and 100% more for the freight of the goods thrown overboard, or 480% minus 280%.

They therefore are actually to receive	-	-	-	-	-	-	-	£200
A. is to contribute 50%, but has lost 500%; therefore A. is to receive	-	-	-	-	-	-	-	450
B. is to contribute 100%, but has lost 200%; therefore B. is to receive	-	-	-	-	-	-	-	100

Total to be actually received £750

On the other hand, C., D., and E. have lost nothing,	}	C.	-	-	£ 50
And are to pay as before, viz.,		D.	-	-	200
		E.	-	-	500

Total to be actually paid £750

which is exactly equal to the total to be actually received, and must be paid by and to each person in rateable proportion, to be ascertained by another calculation, with which it is unnecessary to trouble the reader.

In the above estimate of losses, I have included the freight of the goods thrown overboard, which appears to be proper, as the freight of these goods is to be paid, and their supposed value is taken clear of freight as well as other charges, although this article is omitted in the example proposed by *Pothier* (h). But I find it charged in an adjustment of general average given by *Magens* (i).

Before quitting this part of the subject, it seems proper to notice a case analogous to general average. I allude to a case of salvage on capture and re-capture. The question arose between the owner and charterer of a ship. The ship was chartered for a voyage out and home, at a certain rate per ton per month, a certain sum being payable at the commencement of the voyage,

(A) *Traité des Avaries*, num. 133.

(i) *Magens*, 289.

and another at the end of a year, and the residue at a certain time after she should be reported at the Custom-house in *London*. The two first sums had been paid; the owner sued the charterer for the residue. Salvage had been decreed on the ship and cargo; the latter, and also the expense of obtaining restitution, had been paid out of the price of the goods; and the charterer now claimed to set off those payments against the demand for the residue of the freight. The goods had been sold for a sum much less than the amount of the residue of the freight. Under these circumstances, it was held that the charterer should not pay the salvage on the goods, but should pay a proportion of the expenses of obtaining restitution. The grounds of the decision appear to have been, that the re-capture was no benefit to the charterer, inasmuch as it subjected him to the payment of the freight, and so was in effect beneficial to the owner only by enabling him to demand the freight; and therefore he ought to pay the whole salvage, both on the goods and ship; but the re-capture having enabled the owner to report the ship at the Custom-house, and thereby given him a right to the freight, whether the goods had been restored or no, the restitution of the goods was beneficial to the charterer, and therefore he ought to bear the expense of obtaining their restitution (*j*).

17. By the Civil Law the master of the ship was required to take care to have the contribution settled, and to receive the sums to be contributed, and pay them over to the losers, and might sue and be sued for them, or might retain the goods for the sums to be contributed by their proprietors (*k*). The same power of retaining the goods is given to the master by the *French Ordinance*, and even the further power of sale, under the authority of a magistrate, to the amount of the sums to be contributed (*l*). But *Valin* acquaints us, that this power is never in fact exercised in his country (*m*). Indeed, where contribution is to be made according to the price of the goods at the place of destination, the exercise of this power is incompatible with the mode of adjustment. In this country, which has no peculiar forum established for these matters, but in which the practice of insurance is very

(*j*) *Cox v. May*, 4 M. & S. 152.
What is here called the freight, is more properly the hire of the ship. See *Paul v. Birch*, ante, p. 219.

(*k*) Dig. 14, 2, 2. See *Wellwood*, tit. 21.

(*l*) Liv. 3, tit. 8; *Du Jet*. art. 21.

(*m*) *Tom.* 2, p. 211.

general, it is usual for the broker, who has procured the policy of insurance, to draw up an adjustment of the average, which is commonly paid in the first instance by the insurers without dispute. In case of dispute, the contribution may be recovered either by a suit in equity (*n*), or by an action at law (*o*), instituted by each individual entitled to receive, against each party, that ought to pay, for the amount of his share. But a Court of Equity will not at the instance of the sufferer restrain the master from parting with the goods of the other merchants if he thinks fit to do so (*p*). And in the case of a general ship, where there are many consignees, it is usual for the master, before he delivers the goods, to take a bond from the different merchants for payment of their portions of the average when the same shall be adjusted (*q*).

§ The consignee, if he be the owner of the goods, is of course chargeable, but not in respect of the mere receipt of them under a bill of lading, unless it be made an express condition in the bill of lading that he shall be so (*r*). §

It has been already observed, that in many foreign countries, some losses and expenses are held to be the subject of general average, which are not so held in the law of *England*, the decisions of our Courts being in general founded on a more strict conformity to the principle of the *Rhodian* law, and confining this general contribution to voluntary sacrifices, or to matters in the nature thereof, or consequent thereupon. But where an average had been settled on a different principle in a foreign port, to which the ship was destined, and the merchant had in order to obtain his goods been obliged to contribute to expenses to which he would not have been contributory by the law of *England*, it being proved that the average was settled according to the law of the country, the merchant was not allowed to recover back from the master the money so paid, although both the parties were *British* subjects, and the ship a *British* ship (*s*). It had been previously decided that the holder of a respondentia bond upon

(*n*) *Shepherd and Others v. Wright*, Show. Parl. Cas. 18.

(*o*) *Marham v. Dutrey*, Select Cases of Evid. 58; *Birkley and Others v. Presgrave*, 1 East, 220; *Dobson and Others v. Wilson*, 3 Campb. 480.

(*p*) *Hallet v. Bousfield*, 18 Ves. jun. 187.

(*q*) So deposed by a gentleman very

conversant with this business in the case of *Myer and Others v. Vander Deyl*. Guildhall Sit. before Lord Ellenborough, Ch. J., Dec. 1803. See Form, in the Appendix.

(*r*) *Scaife v. Tobin*, 3 B. & Ad. 523.

(*s*) *Simonds and Another v. White*, 2 B. & C. 805.

goods in a *Danish* ship, who had contributed to general average, should recover the amount of his contribution from an *English* underwriter, on proof that such a security was contributory in *Denmark*, although it is not contributory in *England* (1); and also that the owner of goods should recover on an *English* policy, a contribution to an average settled at *Pisa*, contrary to the *English* law, upon evidence that it had been usual for *English* underwriters to pay in similar cases (u). These two decisions took place at nisi prius. On the other hand it had been decided by the Court of King's Bench, that a merchant who had paid a contribution to an average settled in *Portugal* should not recover the amount on a policy of insurance in the usual form, it not being proved that the adjustment was made according to the known law and usage of the foreign country, otherwise than by a recital in the decree of the foreign tribunal by which the average had been settled, and which the Court did not deem to be sufficient evidence of that fact (v).

"This contract," said Lord *Ellenborough*, "must be governed in point of construction by the law of *England*, where it was framed, couched as it is in the terms of an instrument in general and familiar use, and of known meaning in *England*, unless the parties are to be understood as having contracted on the foot of some other known general usage among merchants relative to the same subject, and shown to have obtained in the country where by the terms of the contract, the adventure is made to determine, and where a general average (if such should, under the events of the voyage, come to be claimed) would of course become demandable. Now without pronouncing what might have been the effect of a statement in this case, that it was the known and invariable usage amongst merchants at *Lisbon*, the port of discharge, to treat losses and expenses of the kind and description, which are specified in the case, as the subjects of general average, we cannot but observe that the case contains no allegation of fact whatsoever on this head, but merely states a decree of a Court at *Lisbon*, which proceeds upon the assumption of this supposed fact as its foundation. Here the underwriters have a right to insist, as this defendant does insist, that the general average, to which alone their indemnity is confined, is general average as it is understood in *England*,

(1) *Walpole v. Ewer*, Park, 629.

(u) *Newman v. Cazalet*, Id. 630.

(v) *Power v. Whitmore*, 4 M. & S. 141.

where the contract of indemnity was formed, no other distinct and different sense, and use of that term being proved in evidence, to obtain in point of fact, and to be generally adopted by usage in the country where the contract was to determine, viz. *Lisbon*; the general laws and practice supposed to authorise this demand of general average being only recited in the terms of another judgment against the assured, and not alleged or proved as a fact in this present case, and which recital in the judgment we are of opinion is not a competent medium of proof for this purpose."

It has been suggested (*w*) that the authority of this case has been impaired by the decision of the Court of King's Bench in the before cited case of *Simonds v. White* (*x*); but that does not appear from the report. Lord Tenterden, in that case, said:—"The case of *Power v. Whitmore* cannot govern the present, for two reasons: first, because it arose between different parties, and on a different species of contract; and, secondly, because in the opinion of the Court, the facts there stated did not show that the average had been adjusted according to the established law and usage of the country where the adjustment was made. If the goods belong entirely to persons of the nation where the ship has arrived, they cannot, with any reason, complain of an adjustment made according to the authority of their own law. Then suppose the goods belong to persons of different nations, the adjustment must be made either according to some one, or it must be made in parts, according to as many different laws as there happen to be persons of different nations concerned in the adventure. The latter mode would be attended with great confusion, perplexity, and inequality, even if it should be found practicable, which in many cases it will not be. In this case, also, therefore, the law of the country must prevail. The shipper of goods, by assenting to general average, must be understood to assent to its adjustment at the usual and proper place, and according to the usage and law of the place at which the adjustment is to be made. I am to be understood as speaking of a case depending upon general rules and reason, and not upon a special or particular contract."

(*w*) American edition, p. 350.

(*x*) 2 B. & C. 805.

CHAPTER X.

OF STOPPAGE IN TRANSITU.

1. When goods have been shipped upon credit, and the consignee has become a bankrupt, or failed, the law, in order to prevent the loss that would happen to the consignor by the delivery of them, allows him, in many cases, to countermand the delivery, and before, or at their arrival at the place of destination, to cause them to be delivered to himself, or to some other person for his use. This is usually called *Stoppage in Transitu*.

2. This practice was first sanctioned and established in the Court of Chancery, by dismissing claims of the assignees of a bankrupt against a foreign merchant or his agent (*a*), and in one case by a decree in favour of a foreign merchant, plaintiff in that Court, the master having refused to deliver the goods either to him or to a trustee for the creditors of the consignee (*b*). Such a Court, however, will not, by injunction, prevent the sailing of a ship in order to enable a consignor to resume his goods, which might be highly inconvenient to other shippers and persons, but leave him to his remedy at law, if the goods be improperly converted (*c*); for this right of stopping *in transitu* has been frequently recognized and carried into effect by the courts of law. It is founded on principles of natural justice and equity. But the law of *England* is in this respect more favourable to the transfer of property, the great subject of commerce, and less attentive to the interest of the seller of goods, than the ancient civil law, or the modern law of many European nations, which is chiefly founded on the civil law (*d*). For the civil law did not in general consider

(*a*) In the case of *Wiseman v. Vandeput*, 2 Vern. 203; *Snee v. Prescott*, 1 Atk. 245.

(*b*) *D'Aguiila v. Lambert*, Amb.*399. It does not appear by the report of this case who the defendant was.

(*c*) *Goodhart v. Lowe*, 2 Jac. & W. 349.

(*d*) *Emerigon*, speaking of the assignment of a bill of lading, says, "Mais ces sortes de cessions déferent au cessionnaire un simple droit ad rem, qui lui donne

the transfer of property to be complete by sale and delivery alone, without payment or security for the price, unless the seller agreed to give a general credit to the buyer for it, but allowed the seller to reclaim the goods out of the possession of the buyer, as being still the seller's own property (*e*). And by the general law of *France*, in the case of insolvency, "The seller, who has sold a thing, and still lies out of the money which he was to have for it, if he finds the thing that he sold in the hands of the buyer, may seize on it, and he is not obliged to share it with the other creditors of the buyer. And it would be the same thing, nay, and with much more reason, if the owner of the thing had given" (delivered) "it to the debtor to sell for him" (*f*). Whereas, by the general law of *England*, when *goods* have been delivered in to the actual or constructive possession of the *buyer*, they cannot be reclaimed (*g*), although, if found remaining unsold in the hands of an insolvent *factor*, they may be reclaimed, because a delivery to a *factor* does not of itself alter the property.

3. The law of *England*, however, will lend its aid to carry into effect the more enlarged rule of equity, which exists in another country, upon a transaction taking place there, as appears by the following case: By the law of *Russia*, "If, in case of unpaid debts or bankruptcies, any body has reason to suspect that the debtor or bankrupt has any thoughts of making the creditor lose,

pouvoir de requérir la délivrance des effets indiqués, sans le mettre en possession effective de la chose même. Ainsi, que jusqu' à ce que la tradition réelle ait été fait dans un temps utile au porteur du connoissement, il n'a qu'une action personnelle, qui est subordonnée aux droits du tiers. Je crois donc qu'une pareille cession ne sauroit nuire, ni au privilege du vendeur primitif, non payé du prix, ni au privilege du donneur à la grosse, ni aux droits de la masse des créanciers. Telles sont nos règles. Le connoissement n'a jamais été considéré parmi nous comme un papier négociable. Le transport du titre est une tradition feinte, qui s'évanouit par la faillite ou l'insolvabilité notoire du cedant."—Emerigon, tom. 1, p. 319, quoted by Dr. Robinson in a note to the *Constantia*, 6 Rob. Ad. Rep. 325. See s. ct. 23 of this chapter.

(*e*) Quod vendidi, non aliter fit acci-

pientis, quam si aut pretium nobis solutum sit, aut satis eo nomine datum, vel etiam fidem habuerimus emptori sine ulla satisfactione. Dig. 18, 1, 19. See also Id. eod. tit. 53, and Dig. 19, 1, 13, 8, and 14, 4, 5, 18.

(*f*) Domat's Civil Law, book 4, tit. 5, sect. 2, art. 3. See also the notes of the same author on that article, and on book 3, tit. 1, sect. 5, art. 3. Where it appears that by the custom of some parts of France, a person who has sold goods, expecting to be paid immediately, may, if he is not paid, retake the goods even out of the possession of a subsequent purchaser.

(*g*) In case of a sale of land, if the purchase-money is not paid, the Court of Chancery considers the purchaser as a trustee for the seller. *Pollexfen v. Moore*, 3 Atk. 272, and see *Blackburn v. Gregson*, 1 Brown's Rep. in Chancery, 420.

and therefore loadeth on board of ship or vessel goods or cargo ; in such a case the creditor is to give notice in town ^(h) to the head Judge of the Court (in districts to the Chief), that the ship or vessel, or goods, or the whole cargo, should be retained time enough until the full payment is made to whom due." " In consequence whereof, and by virtue of that law, if the seller or shipper, in case of bankruptcies, can identify that the merchandize belonging to him is in *Russia* in ships, warehouses, or wherever they may be, in such a case the goods must be given back to the sellers or shippers, *being their property*, and cannot be brought in concurs" ⁽ⁱ⁾ ; that is, into the general mass of the buyer's effects to be distributed among his creditors. Messrs. *Bohtlingk & Co.* of *St. Petersburg*, in pursuance of directions from one *Crane*, of *London*, and as factors for him, shipped a cargo of *Russian* commodities at *St. Petersburg*, on board a ship chartered by *Crane*, and sent invoices thereof, and a bill of lading of part to him ; but learning before the ship's departure that some bills, drawn by them on him in consequence of a previous transaction, were unpaid, they procured from the master of the vessel bills of lading to their own order, and sent them to a friend in *London*, and informed *Crane* that he might have the bills of lading upon giving security to their friend for payment of the bills of exchange to be drawn for the amount of the goods, otherwise their friend would sell the goods on *Crane's* account, and apply the proceeds in discharge of the bills of exchange. *Crane*, in fact, had committed an act of bankruptcy before any of the goods were shipped. On the arrival of the ship in *London*, his assignees demanded the goods of the master, and offered to pay the freight, &c. ; but the master delivered them to the friend of *Bohtlingk & Co.* on their account, in conformity to their indorsement of the bills of lading. Whereupon the assignees of *Crane* brought an action against the master : and the Court held, that the law of *Russia* in this case ought to prevail, although *Bohtlingk & Co.* had not actually taken the goods out of the ship, or instituted legal process for the recovery of them ; considering the master's signature of bills of lading to their order to be equivalent to a stopping *in transitu* or re-delivery

(h) Quære, whether this should not be "towns" or "a town?"

(i) *Mercantile Navigation Laws of*

Russia, published 25th June, 1781, sect. 138.

to them, and to have rendered it unnecessary for them to have recourse to the compulsory process of the law (*k*).

In this case recourse was had to the law of *Russia* to sustain the right of the consignor, because the ship was understood to have been chartered by the consignee, and it was then supposed that the right of stopping *in transitu* did not apply to the case of goods shipped on board a vessel of that description. In another case, however, that arose out of the same transaction, wherein it appeared that the contract was not made in terms of letting and hiring, but contained only that the ship should proceed to *Petersburgh*, and there load from the factors of *Crane* a complete cargo, it was held that the shippers might stop the goods by the law of *England*, without the aid of the *Russian* law (*l*).

4. But to return to the law of *England*. Let us consider, FIRST, In what cases generally goods may be stopped *in transitu*. SECONDLY, Under what circumstances goods are deemed to be *in transitu*, and what not; and, LASTLY, By what acts the right of the consignor may be taken away, before the end of the transit.

FIRST. It should be observed, that the act of stopping *in transitu* is an adverse act on the part of the consignor against the consignee. If a consignee, after an act of bankruptcy, deliver up the bills of lading to another person, upon his undertaking to apply the proceeds of the goods in discharge of bills of exchange drawn for the price, and he accordingly receive the goods, he cannot retain them against the assignees of the bankrupt, although the original consignor afterwards approve of the arrangement; and it seems that the law would be the same, even if the person with whom such an arrangement should be made were at the time an agent of the consignor (*m*). But if the delivery of goods be countermanded by the consignor, the goods having been consigned upon credit, and the consignee having failed or become bankrupt, it is the duty of the master to obey the countermand, and deliver the goods, not to the consignee, but to the order of the consignor. Such countermand and substitution of a new consignee are most easily effected, if the bill of lading is originally made for delivery to the order of the consignor, because in that case the consignor

(*k*) *Inglis and Others v. Usherwood*, 1 East, 515.

(*l*) *Bohtlingk v. Inglis*, 3 East, 381.

(*m*) *Siffkin and Another v. Wray*, 6 East, 371. See *Bartram v. Farebrother*, 4 Bing. 579.

may, if he has reason to suspect the failure, or is afterwards apprized of it, send another part of a bill of lading to a correspondent at the port of destination, indorsed in blank, or for delivery to him. But the countermand may also be made, in the event before mentioned, if the consignee is originally named in the body of the bill of lading (*n*); for the right of stopping *in transitu* does not depend upon a supposition that the property has not passed from the consignor; but, on the contrary, is founded on an admission that the property has become vested in some other person. No question can ever be made upon the right of a man to seize his own goods; but the question in cases of stoppage *in transitu* generally is, whether, under the circumstances, the consignor may divest the property which has passed to another, and revest it again in himself (*o*).

§ In the case of *Hodgson v. Loy*, it was decided that stoppage *in transitu* did not divest the property of the vendee, and therefore that a consignor might exercise that right, although part of the price of the goods shipped had been paid by the consignee (*p*). Lord *Kenyon* in that case said, it was an equitable lien adopted for the purposes of substantial justice. * The common law right of lien enables the vendor to detain goods before he has relinquished possession of them; and this right of stoppage enables him to resume them before the vendee has acquired possession, and to retain them until the price be paid or tendered (*q*). "The vendor's right," said Mr. Justice *Bayley*, delivering the judgment of the Court of King's Bench, "is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion. If goods are sold on credit, and nothing is agreed on as to the time of delivering them, the vendee is immediately entitled to the possession, and the right of possession and the right of property vest at once in him. But his right of possession is not absolute: it is liable to be defeated if he becomes insolvent before he obtains possession. If the seller has despatched the goods to the buyer, and insolvency occur, he has a right, in virtue of his original ownership, to stop them *in transitu*. Why? Because the property is vested in the buyer, so

(*n*) *The Assignees of Burghall v. Howard*, 1 Hen. Bla. 365, note a.

(*o*) See Mr. Justice Buller's opinion in *Lickbarrow v. Mason*, 6 East, 27, 28.

(*p*) *Hodgson v. Loy*, 7 Term Rep. 445.

(*q*) *Kent's Commercial and Maritime Law*, p. 470.

as to subject him to the risk of any accident; but he has not an *indefeasible* right to the possession. His insolvency, without payment of the price, defeats that right. The buyer, or those who stand in his place, may still obtain the right of possession if they will pay or tender the price, or they may still act on their right of property if any thing unwarrantable is done to that right. If, for instance, the original vendor sell when he ought not, they may bring a special action against him for the damage they sustain by such wrongful sale, and recover damages to the extent of that injury" (r).

From this it would appear that the exercise of this right does not proceed upon the ground of rescinding the contract, but assumes its existence and continuance; and as a consequence of that principle, it has been held, that after stopping the goods *in transitu*, the vendor may sue for and recover the price of them, provided he be ready to deliver them on payment (s). Yet, in more recent cases, the question, whether the effect of stoppage *in transitu* be to rescind the contract, or merely to revest the lien of the vendor, was considered to be still unsettled (t). It has been held, that the vendor may re-sell the goods, if they be not duly paid for by the purchaser (u). §

5. A person abroad, who, in pursuance of orders sent by a merchant of this country, purchases goods on his own credit of others, whose names are unknown to the merchant, and who charges the merchant a commission on the price, and consigns them to him, is a consignor within the meaning of this rule: in reality, he is the vendor, and the consignee the vendee (v). So, also, is a person who sends goods to be sold on the joint account of himself and the consignee (w). Even an alien enemy who had shipped a cargo to a *British* merchant under a *British* license has been allowed to stop the goods by his agent on their arrival in *England*; the license being held to give legality to all the consequences of the sale (x). But a person who becomes surety

(r) *Bloxam v. Sanders*, 4 B. & C. 948.

(s) *Kymer v. Suwercrop*, 1 Campb. 109.

(t) See the observations of Lord Tenterden in *Clay v. Harrison*, 10 B. & C. 99; *Stephens v. Wilkinson*, 2 B. & Adol. 223; *Edwards v. Brewer*, 2 M. & W. 375, and see what fell from Mr. Baron Parke in that case, and also in the case

of *James v. Griffin*, 2 M. & W. 623.

(u) *Layford v. Tyler*, Salk. 113.

(v) *Fiese and Another v. Wray*, 3 East, 93.

(w) *Newsom and Another v. Thornton and Another*, 6 East, 17.

(x) *Fenton and Another v. Pearson and Another*, 15 East, 419.

for the consignee, by accepting bills drawn for the price of goods by the vendor, is not a consignor within this rule, although the bills be sent through his hands to the consignee (*y*).

6. If the consignor indorse and transmit the bill of lading, in pursuance of an agreement, and in trust to indemnify against acceptances, or the like, he cannot countermand the delivery, and take back the goods, while the trust and object of the consignment remain unsatisfied; nor must the master re-deliver them to him (*z*). So, if goods be sent by order of the consignee, on his account and at his risk, and the consignor draw bills of exchange upon him for the price, and indorse and transmit the bill of lading, the consignor cannot take possession of the goods at the place of destination, and insist upon immediate payment as the condition of delivering them, the consignee being willing to accept the bills, and not having failed in his circumstances (*a*).

This subject has received much illustration from a judgment delivered by the learned judge of the Court of Admiralty, whose opinion coincides entirely with what has been here advanced. A ship having been taken on a voyage from *Cette* to *Copenhagen*, some brandy found on board was claimed in the Court of Prize, on behalf of a Mr. *Kye*, of the latter place. The consignor, I apprehend, was an enemy, and *Kye* a neutral. The question was, whether the brandy was the property of *Kye*? The documents were not all before the Court in the first instance; but the material facts appear to have stood thus:—The consignor at *Cette* had received orders from *Kye* to send him a quantity of brandy, for which he was to draw on a Mr. *Reinke*; and the letter of orders expressed a wish that the brandy should not be shipped before *April*. The brandy was, in fact, shipped in *January* or *February*, and bills drawn on *Reinke* about that time. By the bill of lading, the brandy was expressed to be shipped on the account and risk of *Kye*, and to be delivered to him. Before the ship's departure, the consignor appears to have received some information, from which he inferred that *Kye* had stopped payment; and he took the master of the ship before a magistrate, and there caused the following indorsement to be made on the

(*y*) *Siffkin and Another v. Wray*, 6 East, 371..

(*z*) *Haille v. Smith and Another*, 1

Bos. & Pull. 563; and see other cases, ante, p. 289.

(*a*) *Walley v. Montgomery*, 3 East, 585.

bill of lading: "That whereas the master cannot deny that he has received one hundred hogsheads of brandy for Mr. *Hans Kye*; but as the interest of the shipper demands that they should not be delivered to Mr. *H. Kye*, the master is prohibited from delivering them to him; but he is directed to deliver them to Mr. *Ryberg*." A letter was probably written about the same time to *Ryberg*, desiring him to take possession of the brandy; a letter was afterwards written to the same person, revoking such order, and saying that *Kye* had ordered the drafts to be accepted, and that the intelligence on which the consignor had acted was erroneous, for not *Kye*, but a Mr. *Kuhl*, had stopped payment. In fact, *Reinke* did not at first accept the drafts for want of orders from *Kye*, which seems to have been owing to the shipment having been made earlier than *Kye* expected. The following observations, which form a part of the very learned judgment delivered on this occasion, are extremely apposite to the subject of the present chapter. "The revocation in this transaction was not explained, but was expressed in absolute terms; and I am clearly of opinion, that if Mr. *Kye* had been an insolvent person, it would have amounted to a complete and effective revindication of the goods. But if the person to whom they are consigned *is not* insolvent; if, from misinformation, or from excess of caution, the vendor has exercised his privilege prematurely, he has assumed a right that did not belong to him, and the consignee will be entitled to the delivery of the goods, with an indemnification for the expenses that may have been incurred. In the law of *England*, as far as I can recollect it, and in all books into which I have looked, it is not an *unlimited* power that is vested in the consignor, to vary the consignment at his pleasure in all cases whatever. It is a privilege allowed to the seller, for the particular purpose of protecting him against the insolvency of the consignee. Certainly it is not necessary that the person should be actually insolvent at the time. If the insolvency happens before the arrival, it would be sufficient, I conceive, to justify what has been done, and to entitle the shipper to the benefit of his own provisional caution. But if the person *is not* insolvent, the ground is not laid, on which alone such a privilege is founded. Then, if Mr. *Kye* has proved insolvent, the shipper will have exercised his privilege; but if he is not insolvent, and has actually provided for the payment of the goods, he will be entitled to the delivery, unless it can be shewn that the right of the shipper extends far-

ther than I have stated it, and that it amounts to an unlimited right to vary the consignment at pleasure. Where goods are shipped without orders, such a right exists. The seller, if he may be so described, retains an absolute power over them, for there is no purchase. But when orders have been received and executed, and delivery has been made to the master of the ship, and bills of lading signed, the seller is *functus officio*, except in the peculiar case in which he is again reinstated by the privileges of the *vendeur primitif*. That will make it a matter of fundamental importance, that the letters containing the original order should be produced. The mercantile law I take to be clear and distinct, that the seller has not a right to vary the consignment, except in the case above stated. The mischief and inconvenience that would ensue on a contrary supposition are extreme. The goods might be put on board, and might lie at the risk of the consignee for two or three months; and if the consignor could come, and resume them at pleasure, it would place the consignee in a situation of great disadvantage, that he should be exposed to the *risk* during such a length of time, for an object which might be eventually defeated at any moment, by the capricious or interested change of intention in the breast of the consignor. It would be to expose the consignee altogether to the mercy of the seller."

The learned judge then proceeds to quote three cases from *Emerigon* (b), in each of which a *French* Court had ordered goods to be delivered to the original consignee, notwithstanding a change of destination by the consignor; and then adds, "These cases I consider to be a clear exposition of the law, that persons having accepted orders, and made the consignment, have not a right to vary that consignment, *except in the sole case of insolvency*. The alteration may be made provisionally, without actual insolvency; but if the insolvency does not take place, the act which has been done is a mere nullity; and the seller has exercised a power to which the law does not ascribe any legal effect." In the result, the goods were restored to *Kye* (c).

7. This right of stopping goods *in transitu* does not belong to a person who had only a lien upon them without a property in them. And therefore if a fuller or dyer, who has fullled or dyed cloths, and who is not obliged to part with the possession of them

(b) The learned judge remarked, that he thought the law of France very important to the case before him, being a

French consignment.

(c) *The Constantia*, *Henrickson*, 6 Rob. Ad. Rep. 321.

until the price of fulling or dyeing them is paid, put them on board a ship for delivery to his employer in pursuance of his orders, and the employer fail, the fuller or dyer cannot countermand the delivery, because his lien and right to retain the cloths ceased, as soon as he parted with the possession of them (*d*).

8. A consignor may exercise this right, although a part of the price of the goods has been paid by the consignee (*e*); or a bill of exchange has been accepted by him for the whole, and indorsed over to a third person (*f*). And an usage for land-carriers to retain goods as a security for the general balance of account due from the consignee, will not prevent the consignor from re-claiming them out of their hands, upon paying the price of the carriage of the particular goods only (*g*). Nor will a similar usage, when the carriage is to be paid by the consignor, authorize the carrier to detain goods from the consignee who has paid the price of them (*h*). And the vendor's right cannot be defeated by a claim against the vendee, as by process of attachment at the suit of a creditor (*i*), or on account of a general lien by the agent of the consignee (*j*).

9. Secondly, Goods are deemed to be *in transitu* not only while they remain in the possession of the carrier, whether by water (*k*) or land (*l*), and although such carrier may have been named and appointed by the consignee; but also when they are in any place of deposit connected with the transmission and delivery of them, and until they arrive at the actual or constructive possession of the consignee at the place named by the buyer to the seller as their destination (*m*). But if the consignee, before the goods reach their ultimate destination, does any act which is equivalent to taking actual possession of them, the transitus is at an end (*n*).

(*d*) *Sweet and Another v. Pym*, 1 East, 4; *Nicholls v. Lawrie*, 2 B. N. C. 83.

(*e*) *Hodgson v. Loy*, 7 Term Rep. in K. B. 440.

(*f*) *Fiese and Another v. Wray*, 3 East, 93; *Edwards v. Brewer*, 2 M. & W. 375.

(*g*) *Oppenheim and Another v. Russell*, 3 Bos. & Pull. 42.

(*h*) *Butler v. Woolcot*, 2 Bos. & Pull. N. B. 64.

(*i*) *Smith v. Goss*, 1 Campb. 282.

(*j*) *Nicholls v. Lefevre*, 2 B. N. C. 83.

(*k*) *Stokes v. La Riviere*, tried before Lord Mansfield at Guildhall, cited 3 Term Rep. 466.

(*l*) *Hunter and Another v. Beale*, tried before Lord Mansfield at Guildhall, 3 Term Rep. 466.

(*m*) *Rowe v. Pickford*, 8 Taunt. 83; *Leeds v. Wright*, 2 Bos. & Pull. 320; *Dixon v. Baldwin*, 5 East, 175; *Coates v. Railton*, 6 B. & C. 422.

(*n*) *Foster v. Frampton* 6 B. & C. 107; *Allen v. Gripp*, 2 Tyrw. 217; *James v. Griffin*, 2 M. & W. 623; *Tucker v. Humphrey*, 4 Bing. 516.

10. If goods are sent by sea to a certain port to be forwarded from thence by land, to the residence of the consignee, and upon the ship's arrival at the port, are delivered to a wharfinger, who receives them on the part of the consignee to be forwarded to him accordingly, they are subject to this right of the consignor in the hands of the wharfinger (*o*), and the law is the same in case of delivery, to a packer appointed by the buyer (*p*), unless the warehouse of the packer be used by the buyer as his own, and be the place of the ultimate destination of the goods (*q*).

§ In all these cases, the question is, whether the warehouseman or wharfinger be the agent of the vendee to receive the goods, or his agent to forward them (*r*). And the *transitus* is not determined, unless possession be taken by the consignee as owner; he may receive the goods into the warehouse of his agent, for a limited purpose, as for the benefit of the consignor to restore them to him, and the intention with which he so receives them, is a question of fact (*s*). Thus, where it appeared that the goods were landed at the warehouse of a wharfinger, which the consignee used as his own for the purpose of stowing such goods, and that though landed with his permission, he did not intend to take possession of them as owner, it was held by the Court of Exchequer, that the *transitus* was not determined. A majority of the learned judges were of opinion, that evidence of such intention was admissible, though it had not been communicated to the wharfinger, but on this point, Lord Abinger dissented, thinking a declaration to the wharfinger or the vendee, of the intention with which the consignee received the goods, necessary to prevent the termination of the transit (*t*). §

11. As I have before observed, the master of a ship chartered wholly by the consignee, is now held to be a carrier, in whose hands goods may be stopped (*u*). But where a ship had been hired by the consignee for a term of years, and was fitted out, victualled and manned by him, and goods were put on board thereof, to be sent *by him* on a mercantile adventure, for which he had bought them; it was

(*o*) *Mills and Another v. Ball*, 2 Bos. & Pull. 457.

(*p*) *Hunt and Others v. Ward*, 3 Term Rep. 467.

(*q*) *Scott and Others v. Pettit*, 3 Bos. & Pull. 469; *Tucker v. Humphrey*, 4 Bing. 516.

(*r*) Per Baron Parke in *James v. Griffin*, 1 Mees. & Wels. 20.

(*s*) *Id.* See the judgments of Lord Abinger and Mr. Baron Parke.

(*t*) *James v. Griffin*, 2 M. & W. 623.

(*u*) *Bohtlingk v. Inglis*, 3 East, 381.

held that the consignor could not stop them; the consignee being in that case the owner of the ship *pro tempore*, and the delivery of the goods on board thereof being equivalent to a delivery into a warehouse belonging to him, and the transit being in effect a transit from and not to him (*v*).

12. In a case of goods sent by a waggon, which arrived at the inn in *London*, where the waggon usually put up, and were there attached by a creditor of the vendee, according to the custom of *London*, and which in that situation were claimed by his assignee, he having become bankrupt, and marked by the assignee, it was held that the vendor could not afterwards countermand the delivery: the goods being deemed to have arrived at the end of their destined journey; and the assignee to have done that, which was equivalent to taking actual possession; the removal of the goods being impracticable on account of the attachment (*w*). The question arose between the vendor and the assignee, who after a claim made by the vendor obtained possession of the goods, the attachment being taken off. An attachment of this sort laid upon goods in the hands of a wharfinger does not defeat the right of the consignor (*x*).

A delivery of goods to an agent of the buyer residing at a seaport, with whom they are to remain until the buyer sends orders for shipping them to a foreign country, is in effect a delivery to the buyer (*y*). So if a buyer having no warehouse of his own, be in the habit of leaving goods at the waggon office, until he gives orders for their shipment or removal, the transit ends upon their arrival at the waggon office (*z*). In each of these cases, as between the buyer and the seller, the goods have arrived at the end of their journey. The subsequent shipment would be the commencement of a new journey under the direction of the buyer.

13. Where a ship, which ought to have performed quarantine, came into port without doing so, and the assignees of the con-

(*v*) *Fowler and Another v. McTaggart and Others*, tried before Mr. Justice Grose at Bristol, and cited 7 Term Rep. 442, and in the case mentioned in the text.

(*w*) *Ellis v. Hunt*, 3 Term Rep. in K. B. 464.

(*x*) *Smith and Another v. Goss*, 1 Campb. 282.

(*y*) *Dixon and Others v. Baldwin*, 5 East, 175. See also *Leeds and Another v. Wright*, 3 Bos. & Pull. 320, and *Coates v. Railton*, 6 B. & C. 422.

(*z*) *Rowe and Another Assignees v. Pickford and Another*, 1 Moore, 526, and 8 Taunt. 83. See *Tucker v. Humphrey*, 4 Bing. 516.

signee, who had received the bill of lading, but had become bankrupt, went on board immediately, and claimed the goods, and opened some of the chests, and put a person on board to keep possession, and the ship being on the same day ordered out of port to perform quarantine, an agent of the consignor, having received another bill of lading, claimed the goods of the master during the performance of quarantine: It was held by Lord *Kenyon*, at the trial of an action brought by the consignor against the assignees, who afterwards obtained possession of the goods, that the right of the consignor to stop the goods *in transitu* existed when the claim was made on his behalf, because the voyage was not at an end until the performance of the quarantine, and the consignee had no power to divest the right of stopping *in transitu*, by taking possession before the conclusion of the voyage. The plaintiff obtained a verdict, and the opinion of his Lordship was afterwards sanctioned by the Court of King's Bench on an application for a new trial. The doctrine of this case is in exact conformity to the tenor of a bill of lading, by which the master always engages to deliver the goods *at* the place of destination, and which therefore gives no authority to the consignee to demand them *before* their arrival at that place (*a*).

By an act of Parliament made for securing the duties payable upon the importation of wine, the proprietor, importer, or consignee, was required, within *twenty* days after the ship had been entered at the Custom-house, to make an entry of the wine, pay the duties, and land the wine; upon failure, the wine was to be conveyed to the King's warehouse, and if the duties were not paid within *three* months, to be publicly sold, to defray the duties and expenses, and the overplus (if any) to be paid to the proprietor or other person authorized to receive the same (*b*). This statute gave occasion to a question upon the subject now under consideration. A quantity of wine arrived here consigned to *Leyland & Cragg*, by whom it was ordered, and who had accepted a bill drawn upon them for the amount. They did not enter, or pay the duties for it within *twenty* days, but before the expiration of that period became bankrupts, and the bill accepted by them

(*a*) *Holst v. Pownal*, 1 Esp. 242. But see *Wright v. Lawes*, 4 Esp. 82; *Mills v. Ball*, 2 B. & P. 461; *Oppenheim v. Russell*, 3 B. & P. 54; *Foster v. Frampton*, 6 B. & C. 107, and see the observa-

tions of Mr. Baron Parke in *James v. Griffin*, 2 M. & W. 633, on the case of *Holst v. Pownal*.

(*b*) 26 Geo. 3. c. 59, s. 4.

was not paid. The wine was conveyed to the King's warehouse according to the statute. The assignees of *Leyland & Cragg* first, and after them an agent of the consignor, claimed the wine of the officers of revenue within the *three* months. The wine, however, was not delivered to either party, but was publicly sold at the expiration of the *three* months, and the assignees of *Leyland & Cragg* brought an action against the broker for the overplus price. The question in the cause therefore was, whether the claim made by the agent of the consignor was a legal stoppage of the goods *in transitu*, before they had come to the possession of the consignee; and Lord *Kenyon*, before whom the cause was tried, held it to be so, and the plaintiffs failed in their suit (*c*). This doctrine was recognized and adopted by Lord *Ellenborough* in a subsequent case relating to wine sent to the King's warehouse under this statute, which will be more fully stated for another purpose in a subsequent part of this chapter.

In these last cases the claim was made before the time arrived at which the consignee had a right to take actual possession. In the case of the goods brought by the waggon to the inn, that time was arrived: the exercise of the right was alone prevented by an extrinsic circumstance wholly unconnected with the conveyance or delivery of the goods.

15. Where the master had begun to unload, and had actually delivered part of a cargo of grain, a bill of exchange having been drawn and accepted for the whole, it was determined that the consignor's right to countermand was wholly at an end, and could not be exercised over the residue of the cargo (*d*). The delivery of part of the goods sold under one entire contract to the purchaser, without any intention on the part of the seller to retain the rest, is deemed a delivery of the whole (*e*), but this rule is confined to cases where the delivery of part is intended to be a delivery of the whole (*f*). The complete delivery of part of one entire cargo to the consignee, determines the transitus of the whole, but the delivery by a carrier is not complete, while he retains his lien for the freight, and therefore, where a carrier having

(*c*) *Northey and Another v. Field*, 2 Esp. N. P. C. 613.

(*d*) *Sluby v. Heyward*, 2 Hen. Black. 504.

(*e*) *Hammond v. Anderson*, 1 N. R.

69; *Hanson v. Meyer*, 6 East, 614.

(*f*) *Simmons v. Swift*, 5 B. & C. 857; *Bunney v. Pointz*, 4 B. & Ad. 568; *Dixon v. Yates*, 5 B. & Ad. 313.

landed a part on a wharf of the consignee, resumed it, and took the whole to his own premises, in order to secure his own demand for freight and carriage, this was held not to be such a delivery as put an end to the right of the consignor (*g*). And where the master had actually delivered the goods to the person by whom they were ordered, and at whose risk they were to be imported, it was held that the consignor could not reclaim them, although the bill of lading was for delivery to the consignor, and was undorsed, and the bill of exchange drawn for the price had been dishonoured (*h*). In this last case the propriety of the delivery as between the consignor and the master seems doubtful. If goods are delivered to a vendee at a wharf, and shipped there in his name with the assent of the vendor, no subsequent stoppage can take place (*i*). But if a carrier after notice from the vendor to stop goods, does by mistake deliver them to the vendee, the right of the vendor will not be taken away, even though, owing to the vendee's having become bankrupt, the goods may have passed into the hands of his assignees (*j*).

It sometimes happens that goods intended for exportation are sold under a contract to deliver them on board a vessel named by the buyer. In such a case the seller may retain his property in the goods by taking a receipt for them from the person in charge of the ship, so long as he keeps this receipt in his own hands, the shipment not being under such circumstances a complete delivery to the buyer (*k*). He will also retain his right to the goods, at least as against the master of the ship, if he demand a receipt in his own name at the time of the shipment, although the receipt be not delivered, and the master afterwards sign and deliver a bill of lading to the buyer, who becomes insolvent before the departure of the ship (*l*).

Goods are frequently sold upon credit while they remain in the custody of a warehouseman, who is to deliver them to the buyer, upon receiving an order for that purpose from the seller. In such cases the custody of the warehouseman has been some-

(*g*) *Crawshay v. Eades*, 1 B. & C. 181.

(*h*) *Coxe and Others v. Harden and Others*, 4 East, 211.

(*i*) *Noble v. Adams*, 7 Taunt. 59, and 2 Marsh. 366.

(*j*) *Litt and Another v. Cowley and Others*, 7 Taunt. 169, and 2 Marsh. 457.

(*k*) *Craven and Another v. Ryder*, 6 Taunt. 433, and 2 Marsh. 127.

(*l*) *Ruck and Hatfield*, 5 B. & A. 632.

times considered as in the nature of a transit; and questions have arisen as to the power of the seller to countermand an order that may have been received by the warehouseman, upon discovering the insolvency of the buyer (*m*). Upon such a question it is important to ascertain whether, according to the nature and subject-matter of the contract, any other act on the part of the seller is to precede the actual delivery of the goods. If nothing is to precede it, and the order has been handed by the buyer to the warehouseman, and he has made the usual entry in his books changing the name of the proprietor (*n*); or even if he has not made such entry (*o*); the handing of the order to the warehouseman is a constructive taking possession by the buyer, and the order cannot be countermanded. *A fortiori* it cannot be countermanded if the buyer has actually removed from the warehouse a part of an entire quantity of goods sold at one fixed and entire price (*p*). But if any thing is to be previously done on the part of the seller to ascertain the amount of the price, or to ascertain and perfect the specific subject of the sale, such for instance as weighing the goods (*q*), an order for delivery may be countermanded before such previous act has been done. Thus where a person contracted to sell all his starch then lying at the warehouse of another, at a certain price per hundred weight to be paid for by a bill of exchange, and a certain number of days was allowed for the delivery, and the seller wrote an order to the warehouseman, to weigh and deliver all his starch to the buyer, and the buyer handed the order to the warehouseman, who weighed a part which the buyer removed, and then the buyer failed before the residue was weighed, it was held that the seller might lawfully countermand the delivery of the residue (*r*). So where a quantity of oil in casks was sold, and according to the course of trade the casks were to be searched by the seller's cooper, the quantity of impure matter to be ascertained by a person attending on behalf of both parties, and the casks to be filled up at the seller's

(*m*) See the case of *Dixon v. Yates*, 5 B. & Ad. 313.

(*n*) By Lord Ellenborough, Ch. J., in *Harman and Others v. Anderson and Others*, 2 Campb. 243.

(*o*) In the same case afterwards by the Court, *id.*

(*p*) *Hammond and Others v. Anderson*, 1 Bos. & Pull. N. R. 69.

(*q*) *Withers and Others v. Lyp and Another*, Holt's N. P. 18.

(*r*) *Hanson and Another v. Meyer*, 6 East, 614.

expense, it was held that the order, which had been delivered to the warehouseman, might be countermanded before these things were done (*s*). On the other hand, upon a sale of ten tons of oil, being part of forty tons contained in one cistern, where nothing remained to be done except to draw off the ten from the forty, it was determined that the seller could not countermand the order after it had been placed in the hands of the warehouseman (*t*). But although something may remain to be done, so that the delivery be not complete, yet if the buyer sell the goods to a third person, and the wharfinger certify to such third person that he has transferred the goods to his account, who thereupon pays the price, the wharfinger thereby makes himself responsible to the third person, and cannot defend himself against his claim under the right of the first seller to stop the goods (*u*).

§ But a second vendee, who neglects to take actual or constructive possession, is in the same situation as the first vendee under whom he claims. His title is defeasible on non-payment of the price by the first vendee (*v*), unless, indeed, he take under a *bond fide* indorsement to him of a bill of lading, for valuable consideration. §

16. Lastly, we are to consider by what acts the right of the consignor may be taken away before the end of the transit.

The bill of lading, in all its usual forms, contains the word "*assigns*;" but it will be proper to advert again to the different forms in common use. Sometimes it is made for delivery to the consignor by name, or assigns; sometimes to order, or assigns, not naming any person; and at other times to the consignee by name, or assigns. In the two first cases, the consignor either transmits it without any indorsement, or indorses his own name generally upon it, without mentioning any other person; or indorses it specially for delivery to a person named by the indorse-

(*s*) Wallabe and Others v. Breeds and Another, 13 East, 522.

(*t*) Whitehouse and Others v. Frost and Others, 12 East, 614.

The several cases of *Hinde v. Whitehouse and Another*, 7 East, 558; *Hurry and Others v. Mangles and Others*, 1 Campb. 452; *Rugg and Others v. Minett and Others*, 11 East, 210; *Zagury v. Furnell and Another*, 2 Campb. 240, and

Stoveld v. Hughes and Another, 14 East, 308, may be consulted with advantage by the reader. They are not quoted in the text, because they seem to be questions upon the vesting of the property.

(*u*) *Hawes v. Watson*, 2 B. & C. 540.

(*v*) *Craven v. Ryder*, 6 Taunt. 433; *Dixon v. Yates*, 5 B. & Ad. 313; *Small v. Moates*, 9 Bing. 574.

ment. Occasionally, too, particular conditions or restrictions respecting the delivery are mentioned in the indorsement. It will be immediately perceived, that in this respect there is a strong resemblance between this instrument and a promissory note. The mere possession of a promissory note made payable to another person, and not indorsed by him, gives the holder no power to indorse over the note. Nor ought the mere possession of a bill of lading, made for delivery to the consignor, and not indorsed by him, to induce any one to believe that the holder is authorized to dispose of the goods (v). On the other hand, if the bill of lading be originally made for delivery to the consignee; or, being made for delivery to the consignor or assigns, or to order or assigns, be indorsed by the consignor, either to a third person by name, or generally without designating any person, it may on the first view be thought that the person named in these two first cases, or who is the holder of the instrument in the latter case, has authority to dispose of the goods as he may think proper.

In what follows, the word *consignee* will be used to denote such a person, and the bill of lading spoken of is to be understood as falling within one of these three descriptions last mentioned, unless the contrary is pointed out.

In point of practice, it frequently happens that the consignee, having received the bill of lading, sells the goods for a valuable consideration, or raises money upon them, before their arrival, and delivers over the bill of lading to a third person, who is wholly ignorant of the nature or terms of the consignment, and does not know that the consignee is not absolutely entitled to receive and dispose of them; under such circumstances, a very important question of law has arisen upon the right of the consignor to countermand the delivery as between him and the person to whom the bill of lading has been thus delivered, without any fraud or collusion.

Of the frequency of the practice to assign bills of lading among merchants, and the conveniency of the practice in many cases, there is no doubt; but not every mercantile practice of frequent use, and even of general convenience, is, or ought to become, in all its consequences, a part of the law of the land; for, if such a rule were adopted, the law must in many cases depart from its

(v) Ante p. 286.

own principles, and vary with the varying fashions of the times ; nevertheless, the law of *England* does adopt into its own bosom many of the ancient customs and usages of merchants, and stretch forth its arm to assert and maintain them, when they are found consonant to legal reason and legal wisdom, and most especially when they are calculated to promote honesty, and to prevent fraud. And upon the subject now under consideration, the question is, what extent of legal right the act of the consignee confers upon his assignee (*w*). The earliest mention of this subject in our law books is in the case of *Evans v. Marlett* (*x*), in which *Holt*, Chief Justice, said, "the consignee of a bill of lading has such a property that he may assign it over." And *Shower* said, "that it had been adjudged so in the Exchequer." But in this case the question upon the effect of such an assignment was not properly before the Court, and does not appear to have been discussed or argued ; and the case supposed to be referred to by *Shower* has not been found. In the case of *Snee v. Prescott*, before cited, the right of the pawnee of the bill of lading, as against the consignor, was not noticed or insisted upon. In the case of *Appleby v. Pollock*, which was tried before Chief Justice *Lee*, at Guildhall (*y*), it appeared that one *Brand* shipped certain goods at *Leith*, and consigned them to one *Stratton*, in *London*. *Stratton*, as soon as he received the bill of lading, by indorsement thereon, assigned the goods to the plaintiff for 160*l.*, and soon afterwards became a bankrupt. *Brand*, hearing of the bankruptcy, took process out of some Court in *Scotland*, to attach the goods in the hands of *Pollock*, the master of the ship ; but the ship having left *Leith*, the process was executed at sea. Upon the arrival of the ship at *London*, the master refused to deliver the goods to the plaintiff, *Appleby*, unless he would indemnify him against the process in *Scotland*, and thereupon *Appleby* brought the present action to recover the value of the goods. At the trial of the cause, the Chief Justice declared himself to be of

(*w*) According to Emerigon, the unpaid seller is not, by the law of France, affected by a transfer of the bill of lading. See before, sect. 2 of this chapter, p. 455, note (*d*).

(*x*) 1 Lord Raym. 271 ; 12 Mod. 156 ; 3 Salk. 290, but the report in Salkeld does not contain this dictum.

(*y*) Trin. Term, 21 Geo. 2. This case, which is here quoted from two manuscript notes, taken by different persons, does not appear to have been noticed in any of the subsequent cases. In one of the notes, the process is said to have issued out of the Admiralty Court in Scotland.

opinion that the assignment gave the plaintiff a sufficient property to maintain the action, if, under the circumstances, he was entitled to do so. The general question, upon the right of the consignor to stop the goods and countermand the delivery, as against an assignee of the bill of lading, does not appear to have been agitated: parol evidence was given, that by the law of *Scotland*, if goods are arrested, the holder must give security not to part with them, and the defendant relied on the effect of the process, by which these goods were attached; as to which the Chief Justice said, "If the process could have attached these goods, it could only have done so within the jurisdiction of the Court; and it does not appear that the place where the goods were attached was within the jurisdiction of the Court, and it lay upon the defendant to make that out." And the Chief Justice therefore directed the jury to find a verdict for the plaintiff to the value of the goods. In the case of *Wright v. Campbell* (2), which arose on a consignment of goods to one *Swanwick*, who was the factor of the consignor, and who by indorsement assigned the bill of lading to a third person, Lord *Mansfield* said, "If the goods are *bonâ fide* sold by the factor at sea (as they may be where no delivery can be given) the sale will be good: the vendee shall hold them by virtue of the bill of sale, though no actual possession is delivered; and the owner can never dispute with the vendee, because the goods were sold *bonâ fide*, and with the owner's own authority;" but the Court, thinking there was reason to believe the assignment to have been fraudulent, sent the cause to a second trial, in order that the jury might determine that point. In the case of *Caldwell v. Ball* (a), it was considered by the Court, that a bill of lading is assignable in its nature, and that by indorsement thereof the property vests in the assignee; but that case did not properly turn upon the effect of the assignment as between the consignor and the assignee, and was decided upon the ground that the defendant, the master of the ship, had discharged his duty by delivering the goods to the person to whom the consignor had first indorsed the bill of lading, and who appeared, upon the whole, to have the better title; the right of stoppage *in transitu*,

(2) 4 Burr. 2046; 1 Black. Rep. 628. According to the report in Blackstone, Mr. Justice Yates expressed a doubt, "whether an assignment of a bill of lad-

ing made it negotiable in the same degree as a bill of exchange."

(a) 1 Term Rep. K. B. 205.

or the divestment of that right, not being in question. In the case of *Hibbert v. Carter* (b), which happened very soon afterwards, and was a question of interest as requisite to sustain an action upon a policy of insurance, the Court thought that the indorsement of the bill of lading by the consignor to a third person absolutely transferred the property, until it appeared to have been made only for the purpose of binding the net proceeds as a security for a pre-existing debt, and that the consignor was not intended to be discharged from the debt, if the goods had perished on the voyage.

17. Shortly after this last determination, the question now under consideration was brought before the Court of King's Bench for decision, as the point and hinge of the cause of *Lickbarrow & others v. Mason* (c), in which case it appeared that Messrs. *Turing & Co.* had shipped goods at *Middleburgh* for *Liverpool*, by the order of one *Freeman*, of *Rotterdam*, and drawn bills of exchange upon him for the price, and taken from the master three bills of lading for delivery of the goods to order or assigns, two of which they indorsed in blank, and transmitted them, together with an invoice, to *Freeman* at *Rotterdam*, who sent them and the invoice to the plaintiffs at *Liverpool*, in the same state in which he received them, that they might receive and sell the goods on his account, and drew bills of exchange upon them to nearly the amount. *Freeman* and the plaintiffs accepted the bills of exchange drawn upon them respectively; but, between the ship's departure and her arrival at *Liverpool*, *Freeman* became a bankrupt and absconded, and *Turing & Co.* sent another of the bills of lading to the defendants, indorsed specially for delivery to them; and they thereupon obtained the goods from the master. *Turing & Co.* afterwards paid the bills of exchange drawn by them upon *Freeman*, and the plaintiffs paid those which had been drawn upon them by *Freeman*. The Court, after solemn argument and deliberation, held, that by an assignment made by the consignee for a valuable consideration, and without notice to the assignee that the goods were not paid for, the property was absolutely transferred to the assignee, and that the consignor was

(b) 1 Term Rep. K. B. 745.

(c) 2 Term Rep. K. B. 63. The facts appear upon the plaintiff's evidence, to which the defendants demurred. See the

very learned opinion delivered by Mr. Justice Buller in the House of Lords, 6 East, 21 notis.

by such assignment deprived of the right to stop the goods *in transitu*, which, as against the original consignee, he might have exercised. From this decision an appeal was made by writ of error to the judges of the Courts of Common Pleas and Exchequer (*d*), who reversed the judgment of the Court of King's Bench, holding that the assignment gave to the assignee no other right or title than that which the consignee himself possessed, and consequently that the consignor had a right to stop the goods, and prevent their delivery to the assignee. This judgment was by a second writ of error brought before the House of Lords; but their Lordships, thinking the facts of the case were not laid before them in such a manner as to warrant a decision of the point of law, directed the cause to be tried again by a jury, in order to remedy that defect. It was accordingly tried again, and the Court of King's Bench, (at the head of which Lord *Kenyon* had in the mean time been placed, and who had in another cause (*e*) expressed his approbation of the first judgment in this case, as being founded upon principles of policy and common honesty,) again decided the case without argument, in conformity to the first decision of that Court; and in order that the question might again be carried to the other tribunals (*f*), another writ of error was brought, but it was afterwards abandoned; and it is now the admitted doctrine in our Courts, that the consignee may, under the circumstances before stated, confer an absolute right and property upon a third person, indefeasible by any claim on the part of the consignor. At the second trial of this cause, it was the opinion of the jury, and was stated to be so in the verdict, that by the custom of merchants, bills of lading expressing goods to have been shipped by any person, to be delivered to order or assigns, are, before the ship's arrival, negociable and transferrable by him to any other person, by his indorsing his name, and delivering or transmitting the same so indorsed to such other person; and that, by such indorsement, delivery, and transmission to such other person, the property is transferred to such other person. And evidence to the same effect was given at a trial in a subsequent case (*g*).

The right of parties may often depend upon the state of things at the time when the bill of lading is indorsed by the consignor;

(*d*) 1 Hen. Black. 357.

(*e*) *Solomons v. Nissen*, 2 Term Rep. K. B. 674.

(*f*) 5 Term Rep. K. B. 683.

(*g*) *Haille v. Smith*, 1 Bos. & Pull. 563.

thus, where the consignor was indebted to the consignee on the balance of accounts, including bills of exchange still running, accepted by the consignee for him, it was held that the goods shipped on account of this balance could not be stopped by the consignor upon the consignee becoming insolvent before the bills of exchange were paid.

§ This was decided in the case of *Vertue and another v. Jewell*(h), which was an action of trover for 180 quarters of barley. It appeared that on the 30th of November, 1813, this barley was shipped at Yarmouth, by Daniel Bloom, on board the sloop *Dolphin*, of which the defendant was master. The bill of lading made the barley deliverable in the port of London, to the order of the shipper, and was indorsed by him to Burrows and Winn, corn-factors and corn-merchants in the city. They received the bill of lading on the 4th of December. In the month of October preceding, J. W. Ayres, for their accommodation, had accepted a bill for £350, which was to become due in nine days, and they owed him several hundred pounds besides, on another account. They had then, to the knowledge of Ayres, become much embarrassed in their affairs, and unable to provide for the bill of exchange. They therefore, for the purpose of covering him, of their own accord, proposed to indorse to him the bill of lading of the barley. They accordingly did so on the 6th of December, and made out a regular sale note to him. On the same day they stopped payment. Ayres immediately after indorsed the bill of lading, and made out a similar note to the plaintiffs. The bill of exchange for £350, which Burrows and Winn had negotiated, he paid regularly when it became due. The *Dolphin* arrived in the river Thames on the 17th of December, and the barley being demanded by the plaintiffs the defendant refused to deliver it, having had an indemnity from Bloom, the consignor. At the time it was shipped, and from thence, till the indorsement of the bill of lading by Burrows & Winn, Bloom was indebted to Burrows & Winn upon the balance of accounts, including bills of exchange then running, which they accepted for him to the amount of 590*l.* being considerably more than the value of the barley, and it was on account of this balance that the barley was consigned to them. The bills so accepted were never paid by Burrows & Winn, who became bankrupt in the end of December,

(A) 4 Campb. 31, and see the cases, ante, p. 286, 289.

and were then indebted to *Bloom* above 2000*l*. Lord *Ellenborough* ruled that, under these circumstances, *Bloom* had no right to stop in transitu, and that the barley being consigned to *Burrows & Winn* on account of the balance which then existed in their favour, the property vested in them absolutely. The transfer from them to *Ayres* would not have defeated the right to stop in transitu. If the consignee does indorse the bill of lading for a valuable consideration to a *bonâ fide* purchaser without notice, the right to stop in transitu is gone as against the indorsee, although it would have remained in force as against the consignee, had the bill of lading not been indorsed. But *Ayres* here had notice of the insolvency of *Burrows & Winn*; and if against them there existed any right to stop in transitu he could not claim this barley. The circumstance, however, of *Bloom* being indebted to them on the balance of accounts, divested him of all control over the barley from the moment of the shipment. The non-payment of the bills of exchange cannot be considered. The rights of the parties must depend on the state of things when the bill of lading was signed and indorsed."

In this ruling of the Chief Justice, the Court, on motion for a new trial, concurred, observing, that under these circumstances *Burrows & Winn* were to be considered the purchasers of the goods for a valuable consideration (i). §

The validity of an assignment is not confined to those cases, in which the assignee has no notice *that the goods have not been actually paid for in money*. If the assignee takes the assign-

(i) The law in America is the same. A consignor cannot stop goods in transitu when they are shipped to pay a pre-*cedent* debt. (*Wood v. Roach*, 2 Dall. 180, 1 *Yates'* Rep. 177.) Neither can he stop them when the consignee is his own agent, if the goods are a shipment for a *cestui que trust* who has paid the consideration. (*Walter v. Ross*, 2 Wash. Cir. Rep. 283.) And when once the bill of lading is signed by the master after the goods are on board, under such circumstances the consignor and master cannot change the right of property by any change of the papers, so as to divest the interest already vested in the consignee. (*Summerell v. Elder*, 1 Binn. Rep. 106.) But where a shipment is made to a credi-

tor on account and risk of the consignor, and there is no contract respecting it between the consignor and consignee, then the right of stoppage and transfer of the property continue, so that the creditor may be defeated by a transfer or countermand before the bill of lading reaches him. (*Walter v. Ross*, 2 Wash. Cir. Rep. 283.) And a factor, who is a creditor also, has no lien on goods consigned to him by his principal for account and risk of the shipper if before they get into his actual possession, the consignor has *bonâ fide* assigned the bill of lading. (*Ryburgh v. Snell*, 2 Wash. Cir. Rep. 294, 403.)—Judge *Story's* note to American Edition, p. 389.

ment *bond fide* without notice of any such circumstances as would render the bill of lading not fairly and honestly assignable, he acquires a good title against the consignor. Goods sold are seldom actually paid for in money at the time of their shipment: in general a bill of exchange is drawn for the price:—If a person knowing that such is the transaction, and that the bill of exchange has been accepted, takes an assignment of the bill of lading fairly and honestly for a valuable consideration, before the money becomes payable, without any reason to know or apprehend that the consignee is likely to fail and not to pay the money in due course, the consignor cannot prevent the delivery of the goods. This has been solemnly decided in the Court of King's Bench. But if a person assist in contravening the actual terms of the sale on the part of the consignor, or his reasonable expectations arising out of them, or his rights connected therewith; if, for instance, he knows that the consignee is in insolvent circumstances; that no bill has been accepted for the price, or that being accepted it is not likely to be paid; he will stand in the same situation with the consignee, and his interposition under such circumstances being in fraud of this right of the consignor, will not be available to defeat it (*j*). So if he intervenes after the purchase and makes himself a partner in the transaction with the first buyer, and engages as between them two, to pay for the goods, he cannot prevent the exercise of this right, although he may previously have accepted bills drawn upon him by the buyer to a great part of the amount of the price (*k*). A bill of lading was specially indorsed for the delivery of the goods to one *Voss*, if he should accept *and pay* a bill of exchange drawn upon him, and if not, then for delivery to the holder of the draft. *Voss* accepted the draft, and then indorsed the bill of lading to another person for a valuable consideration, but he did not pay the draft when it became due. Lord *Ellenborough* held, that this conditional indorsement made it incumbent on the purchaser to ascertain whether the condition had been actually performed; and that he had no title to the goods (*l*).

18. But it must not be understood that the consignee can in *all* cases by his subsequent indorsement, or delivery of the bill of lading to a third person, for a valuable consideration, and without fraud, defeat the right of the consignor to stop the goods. The na-

(*j*) *Cuming v. Brown*, 9 East, 506.

in B. R. 674.

(*k*) *Solomons v. Nissen*, 2 Term Rep.

(*l*) *Barrow v. Coles*, 3 Camp. 92.

ture and object of the consignment, and the character of the consignee, must be attended to. If the goods be sent to the consignee as a purchaser, he may either sell or pledge them before their arrival, and if the bill of lading has by its form required and received the indorsement of the consignor, a second indorsement by the consignee is not necessary to perfect the transaction between him and the third person. This will appear by attending to the facts of the case of *Lickbarrow v. Mason*. *Freeman* the consignee was a purchaser from *Turing & Co.*, the consignor; *Freeman* did not sell the goods to *Lickbarrow & Co.*, the plaintiffs, but authorized them to receive the goods and sell them on *his* account, obtaining from them their acceptance of his bills of exchange on the credit of the bills of lading, and the expectation that they might repay themselves out of the proceeds of the goods. The bills of lading were for delivery to order or assigns, were indorsed generally by *Turing & Co.* the consignors, and were not again indorsed by *Freeman* the consignee.

19. Before the passing of the 4 Geo. 4, c. 83, amended by 6 Geo. 4, c. 94, if goods were sent to the consignee as a factor, it was thought that his possession of the bill of lading, could not in reason give him any greater power over the goods before their arrival, than his actual possession of them afterwards would do; and as in the case of actual possession, although a factor might sell the goods and thereby bind his principal, because his employment and authority were to sell, but could not pawn or pledge them, because he is not by his employment authorized so to do; so before the arrival of the goods, it was held in several cases that he could not divest the consignor's right to stop them, by indorsing or delivering over the bill of lading as a pledge.

§ The law of *England* upon this subject differed from that of all commercial nations, except the *United States of America* (*m*), and there seems 'good reason to suppose that this anomaly was the result of some mistake (*n*) in the report of a case of *Paterson v. Tash*, decided by Chief Justice *Lee* in 1742 (*o*), to which the judges through a long series of subsequent decisions felt themselves

(*m*) Since the passing of the 6 Geo. 4, similar acts have been passed by the Legislatures of the States of New York and of Rhode Island.—*Kent's Commentaries*, Edinburgh Edition, p. 554.

(*n*) See the evidence of Mr. Manning, (of the Western Circuit) before the Committee of the House of Commons on the bill, 1822, and 1823.

(*o*) *Strange*, 1178.

bound (o), but not without much variety of opinion respecting the policy of the law, to adhere (p). The opinion of mercantile men on the other hand was almost unanimous, that a factor or commercial agent intrusted by his principal with the symbols of ownership of property should be deemed the true owner thereof, in respect of third persons dealing with him fairly in the course of business, whether as purchasers or pawnees, and in ignorance of his real character. §

In deference to this opinion, it was by the 6 Geo. 4, c. 94, enacted, That the person in whose name goods are shipped is to be deemed the true owner thereof, so far as to entitle the consignee to a lien thereon in respect of any money or negotiable security advanced by him to such person, or received by such person to his use, *if he has not notice* by the bill of lading or otherwise, at or before the advance or receipt that such person is not the actual and *bond fide* owner of the goods; and such person shall be taken for the purposes of the act to have been entrusted with the goods for the purpose of consignment or of sale, unless the contrary be made to appear (q).

That a person intrusted with and in possession of a bill of lading, or of any of the warrants, certificates or orders, mentioned in the Act, is to be deemed the true owner of the goods described therein, so far as to give validity to any contract or agreement made by him for the sale or disposition of the goods, *or the deposit or pledge thereof*, if the buyer, disponent or pawnee, *has not notice* by the document or otherwise, that such person is not the actual and *bond fide* owner of the goods (r).

That if such person deposit or pledge the goods as security for a pre-existing debt or demand, he who so takes the deposit or pledge without notice shall acquire such right, title or interest, and no further or other than was possessed by the person making the deposit or pledge (s).

That any person may contract *for the purchase* of goods with any agent entrusted with the goods, or to whom they may be con-

(o) *Newson v. Thornton*, 6 East 17; *Martini v. Coles*, 1 M. & S. 140; *Shipley v. Kymer*, 1 M. & S. 454; *Solly v. Rathbone*, 2 M. & S. 298; *Cochran v. Irlam*, 2 M. & S. 301.

(p) See the judgment of the King's Bench in *Queiroz v. Trueman*, 3 B. &

C. 342, and that of the Common Pleas in *Error from K. B. in Williams v. Barton*, 3 Bing. 139.

(q) 6 Geo. 4, c. 94, s. 1.

(r) Sect. 2.

(s) Sect. 3.

signed, and receive and pay for the same to the agent, *notwithstanding he shall have notice* that the party with whom he contracts is an agent, if such contract and payment be made in the ordinary and usual course of business, and he has not at the time of the contract or payment, notice that the agent is not authorized to sell or to receive the price (*t*).

That any person may accept any goods, or any such *document* as aforesaid, on deposit or pledge from any factor or agent, *notwithstanding he shall have notice* that the party is a factor or agent; but in such case he shall acquire such right, title or interest, and no further or other than was possessed by the factor or agent at the time of the deposit or pledge (*u*).

That the act shall not prevent the true owner of the goods from recovering them from his factor or agent, before a sale, deposit or pledge, or from the assignees of such factor or agent, in the event of his bankruptcy: nor from the buyer the price of the goods, subject to any right of set-off on the part of the buyer against the factor or agent (*v*): nor from recovering the goods deposited or pledged upon repayment of the money, or restoration of the negotiable instrument advanced on the security thereof to the factor or agent; and upon payment of such further money or restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money equal to the amount of such instrument, nor from recovering from any person any balance remaining in his hands as the produce of a sale of the goods, after deducting the money or negotiable instrument advanced on the security thereof. And that in case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed shall be held to have discharged, *pro tanto* his debt to the estate of the bankrupt (*w*).

(*t*) 6 Geo. 4, 3. 94, s. 4. A wharfinger, who received flour in that capacity, and without any authority to sell, is not within this provision, although he was in the habit of doing business as a flour-factor. *Monk v. Whittembury*, 4 B. & Ad. 484.

(*u*) Sect. 5, and see *Fletcher v. Heath*, 7 B. & C. 517; *Blandy v. Allan*. 3 C. & P. 447; *Taylor v. Trueman*, M. & M. 463.

(*v*) *Baring v. Corrie*, 2 B. & Ald. 137.

(*w*) 6 Geo. 4, c. 94. s. 6. By the 7

& 8 Geo. 4, c. 29, s. 51, it is enacted, That if any factor or agent entrusted for the purpose of sale, with any goods or merchandise, or entrusted with any bill of lading, warehousekeeper's or wharfinger's certificate, or warrant or order for the delivery of goods or merchandise, shall, for his own benefit, and in violation of good faith, deposit or pledge any such goods or merchandise, or any of the said documents as a security for any money or negotiable instrument, borrowed or received

Since the publication of the last edition of this work, several cases have been decided upon the construction of this Act of Parliament, some of which have given rise to much discussion and may properly be noticed here.

In an action of trover (*x*) for forty chests of indigo, it appeared that the plaintiffs purchased the indigo of *Nevitt & Co.* While the warrants continued in the possession of *Nevitt & Co.* *J. Nevitt*, a partner in that house, pledged them with the defendants, who afterwards obtained the indigo under them. The question at the trial was, whether the defendants, assuming that they had given the necessary consideration for the warrants, were entitled to the protection of the statute. *Nevitt & Co.* were brokers at *Liverpool*, and *J. Nevitt* resided principally in *London*, and dealt largely in indigo, both as a broker and on his own account. There was some evidence tending each way on the question, whether the defendants had reason to believe that *Nevitt* held the warrants only as a broker. "The expression," said Lord *Tenterden*, "of the statute is, that a party is to be entitled to its protection, if 'he shall not have notice by the documents or otherwise,' that the pledger was not the actual and *bond fide* owner of the goods pledged. A person may have knowledge of a fact either by direct communication, or by being aware of circumstances which must lead a reasonable man applying his mind to them, and judging from them, to the conclusion that the fact is so. Knowledge acquired in either of these ways is enough I think to exclude a party from the benefit of the provisions of this statute; slight suspicion I think will not: the question I shall leave to the jury in this case, where there is no evidence of direct communication, is, whether the circumstances were such as that a reasonable man,

by such factor or agent, at or before the time of making such deposit or pledge, or intended to be thereafter borrowed or received, every such offender shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the Court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to suffer such other punishment by fine or imprisonment, or both, as the Court shall award; but no such factor or agent shall be liable to any prosecution for depositing or pledging any such goods or

merchandise, or any of the said documents, in case the same shall not be made a security for, or subject to, the payment of any greater sum of money than the amount of which, at the time of such deposit or pledge, was justly due and owing to such factor or agent from his principal, together with the amount of any bill or bills of exchange, drawn by or on account of such principal, and accepted by such factor or agent.

(*x*) *Evans v. Trueman, 1 Moody & Rob. 10.*

and a man of business, applying his understanding to them, would know that the goods were not *Nevitt's*?"

In the case of *Close v. Holmes* (registered officer of the *Hull Banking Company*,) (*y*), which was an action of trover for cream of tartar, brimstone, and argol, the defendant pleaded, that one *John Hollingsworth* was intrusted with and in possession of certain bills of lading, dock warrants, warehouse-keepers' certificates, wharfinger's certificates, and warrants or orders for the delivery of goods therein mentioned; that *Hollingsworth* was thereby enabled to appear as owner of the said goods, and was believed to be so by the banking company, who had no reason to know or suspect that he was not the owner of them, and that he pledged them to the company, who made him advances on the faith of them.

The facts were these:—The plaintiffs, who were merchants at *Manchester*, having establishments abroad at *Naples* and other places, were in the habit of making consignments to *Hollingsworth*, who was a ship and insurance broker and commission agent at *Hull*, as their agent for sale. In *January 1835*, the ship *Francis* arrived at *Hull* with some brimstone and cream of tartar on board, consigned by the plaintiffs to *Hollingsworth*, for sale on their account, the bills of lading being also transmitted to him, indorsed by the shippers in blank. *Hollingsworth* had the goods landed, and placed them in a bonded warehouse (*Hopwood's*) in his own name. In the following month, another ship (the *Dean*) also arrived at *Hull* with some argol and more cream of tartar on board, belonging to the plaintiffs, and consigned, in like manner, to *Hollingsworth*; the bills of lading being likewise indorsed and transmitted to him as in the former instance. The goods *ex the Dean* were landed and placed by *Hollingsworth*, in his own name, in the bonded warehouse of the *Hull Dock Company*. In *June, 1835*, *Hollingsworth* applied to the defendant's banking company for an advance of 500*l.*, for which he offered to lodge some goods, which he said that he had on consignment, and that he had made advances on them. The banking company acceded to his application, and on the 17th *June* he obtained from the *Hull Dock Company* and lodged with the banking company an acknowledgment in writing that they (the *Dock Company*) held the argol and the cream of tartar *ex the Dean* to the order of the banking com-

pany, and thereupon the banking company paid his acceptance for 500*l.* In the month of *July*, the banking company paid another acceptance of *Hollingsworth's* for 250*l.*, for which he pledged with them a delivery order, accepted by *Hopwood*, for the brimstone and cream of tartar *ex the Francis*; but on neither occasion did *Hollingsworth* pledge or produce to the banking company the bills of lading. Upon these facts, Baron *Alderson* left it to the jury to say, whether the banking company, at the time they made the advances, were aware of the fact that the goods did not belong to *Hollingsworth*, and whether *Hollingsworth* himself had any lien on the argol, which he could transfer to the defendant under the 5th section of the statute. With regard to the other point, his lordship expressed a clear opinion that the statute gave validity only to pledges by a factor of documents, with which the real owner had previously entrusted him, and that it did not extend to the pledge of documents created (as in the present instance (*z*), by the factor himself.

It has been determined, also, that the negociable instruments mentioned in the second section *as a security*, are such as pass by indorsement and delivery, as bills of exchange and promissory notes, and not *East India* warrants, or other documents of that nature (*a*). The third section, which transfers to a person taking goods in pledge the same right as the factor had at the time of pledge, does not prevent the owner from bringing an action of trover against him to recover them, although he can recover no more than the balance, after deducting what is due to the factor (*b*).

On the fifth section it has been held, that where a broker accepts bills for his principal, on the security of goods then in his hands, and pledges the goods with a person who has no notice of the agency, and does not inform the principal of the transaction, the broker only transfers such right as he has, which is, a right to be indemnified against the bills accepted; and that the principal, having

(*z*) These decisions have given rise to a great deal of discussion respecting the policy of the present Factors' Act. The word *otherwise* in the second section, is said to have been inserted by Lord Eldon in committee, against the opinion of the promoters of the bill. See the question very fully discussed in a recent pamphlet, "Remarks on the Law of Principal, and

Factor, with Suggestions for Remedying its Defects."—Pelham Richardson, 1840.

(*a*) *Taylor v. Trueman*, 1 M. & M. 453; *Taylor v. Kymer*, 3 B. & Adol. 320.

(*b*) *Taylor v. Trueman*, 1 M. & M. 453; *Paley's Principal and Agent*, by Lloyd, p. 230.

satisfied those bills, has a right to have his goods back from the pawnee without paying the amount for which they were pledged (c).

Where a bill of lading is thus pledged by the consignee of the goods, as a security for his own debt, the right to stop them *in transitu*, in case of the consignee's insolvency, is not absolutely defeated, as in the case of a sale of the bill of lading by the consignee. The legal right to the possession of the goods passes to the pledgee; but the vendor may still assert his interest in them, subject to the rights of the pledgee, and will have a right, at least in equity, to the residue which may remain, after satisfaction of the pledgee's claim. And if other goods, belonging to the pledger, are pledged along with those represented by the bill of lading, the vendor will be entitled to have the proceeds of the former applied to the discharge of the pledgee's claim before his own goods are so appropriated. In a recent case before the Court of King's Bench (d), it appeared that the plaintiff, *Westzinthus*, shipped at *Leghorn* twenty-three casks of oil to *Lapage & Co.*, merchants at *Liverpool*, in execution of an order transmitted by them to him; and, at the same time, drew a bill of exchange on them for the amount of the oil. This bill, together with the bill of lading for the oil, was transmitted to certain agents of *Westzinthus*, with instructions to deliver the bill of lading to *Lapage & Co.*, upon their accepting the bill of exchange so drawn on them; and accordingly, *Lapage & Co.* accepted the bill of exchange, and the bill of lading was delivered to them. *Lapage & Co.*, after having pledged the bill of lading with *Hardman & Co.*, as a security for certain advances, became bankrupt, and their acceptance in the plaintiff's favour was dishonoured. At the time of their bankruptcy, they owed *Hardman & Co.* 9271*l.* on account of advances, as security for which they held, besides the bill of lading, goods to the value of 9961*l.* 1*s.* 7*d.*, belonging to *Lapage & Co.* themselves. The Court held, that *Westzinthus*, who had, upon the bankruptcy of *Lapage & Co.*, given notice to the master of the ship that he claimed to stop the oil *in transitu*, had a right to insist upon the proceeds of the goods of *Lapage & Co.*

(c) *Fletcher v. Heath*, 7 B. & C. 517. It has been held also, that in order to bring a case within this section of the statute, the transfer must have been made expressly as a pledge, and that a fraudulent sale was not within it.

Thompson v. Farmer, 1 M. & M. 48.

(d) In the matter of Arbitration between *Westzinthus* and the Assignees of *Lapage & Co.*, and between *Rogers & Co.*, and the same Assignees, 5 B. & Adol. 817.

being applied to the discharge of the *lien* of *Hardman & Co.*, and as they proved sufficient to satisfy it, had a right to receive the entire proceeds of the oils. "In this case," said Lord *Denman*, delivering the judgment of the Court of King's Bench, "*Westzinthus*, who was the unpaid vendor at the time when his agents made the demand on the master of the vessel on board which the oil was, had no right to take possession on the insolvency of the vendee, *Lapage*, because the property in, and also the right of the possession of, the goods, was unquestionably vested at the time in *Hardman*, the indorsee of the bill of lading, for a valuable consideration. The demand, therefore, of *Westzinthus* gave him no legal right to the property or possession of the goods; and it appears to us that he can have no claim at law, except as arising out of the right of retaking the possession of the goods themselves, which right was determined by the indorsement of the bill of lading. It is not necessary to determine what would have been his situation if either *Lapage* or himself had paid off *Hardman's* demand prior to the notice given to the master, or to the actual receipt of the goods by the vendee.

"As *Westzinthus* would have had a clear right at law to resume the possession of the goods on the insolvency of the vendee, had it not been for the transfer of the property and right of possession by the indorsement of the bill of lading, for a valuable consideration to *Hardman*, it appears to us that in a court of equity such transfer would be treated as a pledge or mortgage only, and *Westzinthus* would be considered as having resumed his former interest in the goods, subject to that pledge or mortgage,—in analogy to the common case of a mortgage of a real estate, which is considered as a mere security, and the mortgagor as the owner of the land. We therefore think, that *Westzinthus*, by his attempted stoppage *in transitu*, acquired a right to the goods in equity (subject to *Hardman's* lien thereon) as against *Lapage* and his assignees, who are bound by the same equities that *Lapage* himself was. And this view of the case agrees with the opinion of Mr. Justice *Buller*, in his comment on the case of *Snee v. Prescott*, in *Lickbarrow v. Mason* (e). If, then, *Westzinthus* had an equitable right to the oil, subject to *Hardman's* lien thereon, for his debt, he would, by means of his goods, have become a surety to *Hard-*

(e) 6 East, 29, note.

man for *Lapage's* debt, and would then have a clear equity to oblige *Hardman* to have recourse against *Lapage's* own goods deposited with him, to pay his debt in ease of the surety; and all the goods, both of *Lapage* and *Westzinthus*, having been sold, he would have a right to insist upon the proceeds of *Lapage's* goods being appropriated, in the first instance, to the payment of the debt." §

20. Indeed, the indorsement of a bill of lading was not considered to be properly an actual transfer in itself, of the goods therein mentioned, but rather evidence, or an act raising a presumption of such a transfer; and consequently the object and legal effect of the indorsement might be ascertained by other circumstances. Therefore, where a bill of lading was indorsed and transmitted by the consignor to an agent, without valuable consideration, to enable him to receive the goods therein mentioned, for the use of the consignor, in case the consignee should fail; it was doubted whether the agent could maintain an action at law for the goods in his own name. The Court appeared inclined to think, that he could not, but the cause in which the point arose, was decided on another ground (f).

21. And as on the one hand, the indorsement or delivery of the bill of lading by the consignor, did not necessarily enable the consignee to divest the consignor's right of stopping *in transitu*, so on the other hand, it was thought there might be circumstances equivalent to such indorsement and delivery, which might enable the consignee to do this. As where *Thompson & Co.* sent goods from *Ireland* to *London*, to be sold by *Eustace & Holland* their factors there, and wrote to them to insure the goods, and sent them a bill of lading not indorsed, but having the names of *Eustace & Holland* on the back, and being applied to by them for an indorsement, answered by letter that if the bill of lading was not indorsed, it was a mistake, and they would send an indorsement; upon which *Eustace & Holland* sold the goods; and it afterwards happening that they were unable to pay bills drawn upon them by *Thompson & Co.* on the general account, one *Dick* paid those bills for the honour of the drawers, and knowing all these transactions applied to them for an indorsement of the bill of lading, which they sent him; and *Dick* thereupon demanded

(f) *Coxe v. Harden*, 4 East, 211.

the goods of the master of the ship, who refused to deliver them to him, but delivered them to the vendees of *Eustace & Holland*; upon this *Dick* brought an action against the master, which was tried before Lord *Kenyon*, and his Lordship ruled that the plaintiff had, under such circumstances, no right to take the goods out of the possession of the vendees of *Eustace & Holland*; *Eustace & Holland* being factors authorized to transfer the property in them, and having actually done so (g).

22. In the case last quoted there were special facts which were considered as equivalent to an indorsement of the bill of lading by the consignor. But if there were not such facts, and the bill was for delivery to order or assigns, and transmitted unindorsed, it was thought that the holder thereof should not by an attempt to transfer the property of the goods to a third person, divest the right of the consignor to stop them *in transitu*. This will appear by the following case. One *Fox*, a wine merchant at *London*, having ordered five pipes of wine from Messrs. *Abbott & Co.* of *Oporto*, they loaded them on board a vessel bound for *London*, and took from the master bills of lading for delivery to order or assigns. One of these bills they transmitted to *Fox* in a letter, wherein they said they had shipped the wine on his account, had sent him a bill of lading, and drawn upon him for the price. *Fox* accepted the bill of exchange thus drawn upon him, which was payable nine months after date. Before the bill of exchange became due, the wine arrived, and *Fox* not being able to pay the duties, it was sent to the King's warehouse, under the statute 26 Geo. 3, c. 59; while it remained there, *Fox* being indebted to one *Mary Nix*, and called upon for payment, and unable to pay, sold the wine to her for 40*l.* then paid to him, and the amount of his debt. He became bankrupt soon afterwards; and the agents of the consignors having paid the duties and obtained the goods, *Mrs. Nix* brought an action against them for the value. The case was tried before Lord *Ellenborough*; and it was insisted on behalf of the plaintiff, that there was no difference between the indorsement of a bill of lading by the consignor, and the sending it inclosed in a letter of this import. But his Lordship declared himself to be of a different opinion, and held that the right of the

(g) *Dick v. Lumsden*, Peake's N. P. C. 189.

consignor to stop the goods, was not divested under these circumstances (*h*).

23. But in cases of this nature, an important and difficult question of fact may arise upon the fairness and honesty of the assignment; and even as between the consignor and the original consignee, the right to stop the goods may be doubtful in the particular circumstances of the case; and it would be a great hardship upon the owners and masters of ships, if they were obliged to exercise a judgment upon these doubtful matters of fact, and to decide upon them, and deliver the goods at their own peril. But I apprehend the law does not altogether cast this burden upon them. In the case of *Caldwell v. Ball*, which I have quoted just before, it was held that the master had discharged himself by delivering the goods to the person, to whom the consignor first indorsed the bill of lading; but in that case the question arose between two consignees, to each of whom a bill of lading had been indorsed, and there had been no countermand or attempt to stop *in transitu*, and the master happened to know the priority of indorsement, which was substantially to the owners of the ship, whereas it may often be out of the power of the master to inform himself satisfactorily of the priority of indorsement. In an earlier case, which was tried before Chief Justice *Lee* at Guildhall, and which was an action brought by the assignee of the original consignee against the master, who had delivered the goods to the person, to whom the consignor had sent another bill of lading as a security, and to enable him to take possession of the goods on his behalf, if the consignee should fail, which had been the case; it appeared in evidence, by the testimony of merchants and masters of ships, that by usage, in the case of indorsement of bills of lading to different persons, the master was at liberty to deliver to which ever he thought proper; and upon that ground, the Chief Justice directed the jury to find their verdict in favour of the defendant, and they accordingly did so (*i*). But perhaps this rule might upon further consideration be held to put too much power into the master's hands, and it might in some cases be inconsistent with the acknowledged right to stop *in transitu* and defeat the

(*h*) *Nix v. Olive*, Sit. at Guildhall, before Lord Ellenborough, Ch. J., after Trin. Term, 1805.

(*i*) *Fearon v. Bowers*, 1 Hen. Black. 364, note.

beneficial exercise of it. And it may be collected from a decision of the Court of Common Pleas (*j*), that if the master, being required to deliver the goods to an agent of the consignor, either expressly engage to do so, or say that he will not part with them, until he is certain of a safe delivery, and afterwards deliver them to the consignee or the persons claiming under him, he will be responsible to the consignor, provided it shall turn out that the consignor was legally entitled to countermand the delivery and take back the goods.

24. In general, where two opposite parties claim a right to receive the goods, both or either of them will be willing to give an indemnity to the master; and the master should in prudence deliver the goods to the party, upon whose indemnity he can most safely rely. But if a satisfactory indemnity is not offered, and the master must exercise a discretion; then if the bill of lading has not been assigned over by the consignee, and he has failed, without doubt the master should deliver to the person who claims for the use of the consignor. If the consignor has indorsed bills of lading to different persons, as was the case in *Caldwell v. Ball*, the master should deliver to the person to whom the consignor first made the indorsement (*k*). If the consignee has assigned the bill of lading, and the validity of the assignment be questionable; it seems most proper for the master to deposit the goods in a place of safety, and apply to the Court of Chancery by way of interpleader, to compel the contending parties to litigate their rights by an action between themselves.

The late act of parliament to which I have already referred, will relieve the master from all difficulty in the cases therein provided for.

25. By the law of *France* (*l*) the right of the vendor, or of the person, who has advanced money at *respondentia* on the specific security of goods, cannot be devested by an assignment of the invoice or of the bill of lading; *Emerigon* and *Valin* agree upon this point; although they differ as to the effect of such an assignment upon the right of the general creditors of the assignor; the former

(*j*) *Mills and Another v. Ball*, 2 Bos. & Pull. 457. The defendant was a wharfinger, but the doctrine applies equally to the case of a master.

(*k*) See the three cases in 1 *Emerigon*, 317, 318, quoted by Sir William Scott,

in the case of the *Constantia*, 6 Rob. 328.

(*l*) *Valin* on the French Ordinance, liv. 2, tit. 10, art. 3; *Emerigon*, tom. 1, p. 319. See before, sect. 2, of this chapter, p. 456.

maintaining that their right is not divested by it; the latter insisting that it is divested in favour of the operations of commerce: but admitting this to be contrary to the general policy of the *French Law*, which requires actual delivery of possession in order to effect this purpose, according to its general maxim, that a mere assignment does not vest the property, *simple transport ne saisit*. The Ordinance, as I have already observed (*m*), expressly declares that the sale of a ship at sea shall not prejudice the creditors of the vendor.

(*m*) *Liv.* 2, tit. 10, art. 3. See ante, part 1, chap. 1, sect. 3, p. 17, and *Code de Com.* art. 196.

CHAPTER XI.

OF SALVAGE.

HAVING thus treated of the rights and duties arising out of the contracts between the shipowner and merchant, it seems proper in the next place to consider a subject, which the dangers of navigation frequently render interesting to both alike; namely, the compensation that is to be made to other persons, by whose assistance a ship or its loading may be saved from impending peril, or recovered after actual loss. This compensation is known by the name of *Salvage*, and at present is commonly made by a payment in money, but in the infancy of commerce was more frequently made by the delivery of some portion of the specific articles saved or recovered.

All foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head. In some of them the value to be paid is fixed at a certain portion of the articles saved, or of their value, according to their nature and quality, or the circumstances of the case. But it is obvious that positive and settled rules are little adapted to the administration of justice in varying and unsettled cases; and what can be more various and unsettled, than the degrees of labour experienced on the ocean, or the degrees of peril to which persons who engage in the meritorious task of assisting the distressed on that element are at different times exposed? and therefore in the case of wreck or derelict at sea, the law of *England*, like the law of some other countries, has fixed no positive rule or rate of salvage, but directs only as a general principle, that a reasonable compensation shall be made (*a*).

(*a*) In the case of derelict becoming the property of the crown, it was formerly the settled practice of the Court of Admiralty to give a moiety to the finders or salvors, but the practice has been long

disused, and the reward become discretionary. Case of the *Aquila*, 1 Rob. Ad. Rep. 37; Wellwood's Sea Laws, tit. 24. At present, seldom more than one-half, or less than one-third is given. The

The legislators of all civilized and commercial states in modern times (b), have laboured earnestly to repress by due severity of punishment, the barbarous spirit of plundering the helpless and distressed mariner, whose situation calls for assistance and relief. And very salutary provisions have been made on this subject by the wisdom of our own parliaments (c), but which I shall forbear to detail, as not properly belonging to my subject, and proceed to the consideration of salvage, FIRST, with regard to effects preserved from the perils of the sea; and, SECONDLY, with regard to effects retaken from an enemy, into whose hands they may have fallen.

2. A person, who by his own labour preserves goods which the owner, or those intrusted with the care of them, have either abandoned in distress at sea, or are unable to protect and secure, is entitled by the common law of *England* to retain the possession of the goods saved, until a proper compensation is made to him for his trouble (d). This compensation, if the parties cannot agree upon it, may by the same law be ascertained by a jury in an action

Britannia, Plash, 3 Hag. Ad. Rep. 153; *the Effort*, 3 Hag. Ad. Rep. 165; *Queen Mab, Tollman*, 3 Hag. Ad. Rep. 242. In a case of derelict of very small value, no owner appearing, the whole net value, 35*l.*, was allowed. *William Hamilton, Hughes*, 3 Hag. Ad. Rep. 168. See also *the Frances Mary, Kendall*, 2 Hag. Ad. Rep. 89; *the Rebecca*, 2 Hag. Ad. Rep. 90.

The general principles as to the allowance of salvage, are the same in American as in English jurisprudence. Where the amount of salvage is not fixed by positive law, it must be determined by the principles of the maritime law, and must necessarily rest in an enlarged discretion, to be exercised according to the circumstances of each case. It is impossible, therefore, to lay down any positive rule on the subject. Looking to the current of decisions, it will be found that it is rarely less than *one-third*, or more than *one-half* of the property saved, unless the services have been very inconsiderable, or the amount of the property has been very great. And in cases of derelict, although the rule is now deemed

a flexible one, yet Courts of Admiralty still adhere to a moiety as the favourite amount, and require some peculiar circumstances to displace it.

The Appellate Courts of the United States, are disposed not to encourage appeals in cases of salvage, as mischievous to all parties, and therefore, generally adhere to the salvage given in the District Courts, unless there are very strong circumstances calling for a different rule. Mr. Justice Story's note to *American Edition*, p. 397, and see the cases there cited.

(b) I have used the words "in modern times," because formerly, the claim of the sovereign power in some countries was not less barbarous than the temper of the inhabitants. See Valin's preface to tit. 9 of book 4 of the French Ordin.

(c) See the statutes 3 Edw. 1, c. 4; 4 Edw. 1, stat. 2, s. 2; 12 Anne, stat. 2, c. 18; 26 Geo. 2, c. 19, and 1 and 2 Geo. 4, c. 75 and 76; 1 Black. Com. chap. 8, sect. 11.

(d) *Hartford v. Jones*, 1 Lord Raym. 393; *Baring and Others v. Day*, 8 East, 57.

brought by the salvor against the proprietor of the goods: or the proprietor may tender to the salvor such sum of money as he thinks sufficient, and upon refusal to deliver the goods, bring an action (e) against the salvor; and if the jury think the sum tendered sufficient, he will recover his goods or their value and the costs of his suit. But a person, even though he may be the lord of the manor, cannot entitle himself to a claim of salvage by taking possession of a wreck or parts thereof against the consent of those who are at hand and upon the spot, employed by the owner of the ship to save and preserve them (f). And if one set of persons have taken possession of a vessel abandoned at sea, and are endeavouring to bring it into port and save it, another set have no right to interfere with them and become participators in the salvage unless it appears that the first would not have been able to effect the purpose without the aid of the others (g). Nor, if a vessel be preserved, the cargo of which consists of government stores, is the dispossession of the original salvors by the officers of a king's ship warranted by law without reasonable cause for their interference. Should, however, persons be found in possession, who, from want of experience, may be unfit to be trusted with valuable property, or who have been guilty of gross misconduct, which may render their removal proper and necessary; the interference of the king's officers may in such cases be not only justifiable but even laudable (h). If the salvage is performed at sea (i), or between high and low water mark (k), the Court of Admiralty has jurisdiction over the subject, and will fix the sum to be paid, and adjust the proportions, and take care of the property pending the suit; or if a sale is necessary, direct a sale to be made, and divide the proceeds between the salvors and the proprietors according to equity and reason. And in fixing the rate of salvage, this Court usually has regard not only to the labour and peril incurred by the salvors, but also to the situation in which they may happen to

(e) *Viz.*, of detinue or trover.

(f) *Sutton v. Buck*, 2 Taunt. 302.

(g) *The Maria, Kilstrom*, 1 Edw. 175; *the Charlotta, Nesser*, 2 Hag. Ad. Rep. 361; *the Eugene, Bourne*, 3 Hag. Ad. Rep. 166; *the Effort*, 3 Hag. Ad. Rep. 165; *Queen Mab, Tollman*, 3 Hag. Ad. Rep. 242.

(h) *Blenden Hall, Barr*, 1 Dods. Ad.

Rep. 414.

(i) The jurisdiction of the Court of Admiralty seems not to extend higher up the river Thames than a sand, called the Black Tail Sand. See 6 Rob. 39, and the case of *Baxter and Others v. Reader*, there cited.

(k) 1 & 2 Geo. 4, c. 75, s. 31.

stand with respect to the property saved, to the promptitude and alacrity manifested by them, and to the value of the ship and cargo, as well as the degree of danger from which they were rescued (*l*).

§ "Salvage," said Sir *John Nicholl*, in a recent case (*m*), "is not always a mere compensation for work and labour; various circumstances, upon public considerations, the interests of commerce, the benefit and security of navigation, the lives of the seamen, render it proper to estimate a salvage reward upon a more enlarged and liberal scale. The ingredients of a salvage service are *first*, enterprise in the salvors in going out in tempestuous weather to assist a vessel in distress, risking their own lives to save their fellow-creatures, and to rescue the property of their fellow-subjects. *Secondly*, the degree of danger and distress from which the property is rescued, whether it was in imminent peril and almost certainly lost; if not at the time rescued and preserved. *Thirdly*, the degree of labour and skill which the salvors incur and display, and the time occupied. *Lastly*, the value. Where all these circumstances concur, a large and liberal reward ought to be given; but where none, or scarcely any take place, the compensation can hardly be denominated a salvage compensation; it is little more than a mere remuneration *pro opere et labore*." In civil salvage, the Admiralty does not recognise the rule of proportion, but accords an equitable remuneration for the service rendered. A small proportion where the property is very large may be sufficient for that purpose. The question will always resolve itself into the consideration of circumstances attending the particular case (*n*). Thus, where arbitrators had given one-fourth of the value of a ship, and it was agreed between the salvors and the consignees of the cargo that the amount payable in respect of the cargo should be referred to the Court of Admiralty, that Court, the cargo being valued at 38,000*l.*, awarded 1,000*l.* for contingent losses; 1,500*l.*

(*l*) In the case of the *Upnor*, 2 Hag. Ad. Rep. 3, salvage was refused for bringing into port a barge found without anchor or crew aground, on evidence that it was not uncommon to leave barges there, and fetch them off afterwards. See also *The William Beckford*, *Muirhead*. At the Delegates, 17th and 24th Nov. 1801, MS. 3 Rob. Ad. Rep. 355, S. C.

(*m*) *The Clifton*, *Lightbody*, 3 Hag. Ad. Rep. 117. See also the observations of the learned Judge in the case of the *Hector*, *Freeman*, 3 Hag. Ad. Rep. 90, and the *Industry*, *Davis*, 3 Hag. Ad. Rep. 203.

(*n*) *The Salacia*, *Garland*, 2 Hag. Ad. Rep. 262.

for salvage reward, and 200*l.* for the master's expenses. In one case of extraordinary service, where private treasure and government stores lost on board a king's ship to the amount of 157,000*l.* were recovered by officers and men of the Royal Navy, 54,000*l.* was finally awarded, including the expenses, and a compensation to the Admiralty for the pay, victualling, wear and tear of his Majesty's ships while employed upon that service." (o).

In the case of a homeward-bound *West India* ship taken by the *French*, near the coast of *Jamaica*, while proceeding from *Savannah le Mar* to *Bluefields* to join convoy, and recaptured by persons going in boats from the shore, *one-sixth* was allowed for salvage; and as the voyage homeward, and consequently the right to freight had commenced, and the freight was ultimately earned, the salvage was paid upon the freight as well as the ship and cargo (p). So in the case of the *English* ships liberated from the *French* upon the occupation or capture of *Oporto* by the *British* and *Portuguese* troops, salvage was allowed upon the freight of such of them as had gone out from *England* in ballast under contracts to fetch home cargoes (q).

In the case of a *British* ship, purchased at sea from a *French* privateer by an *American* captain, whose own ship had also been taken by the same privateer; and who was allowed to take his own and the *British* crew on board the purchased ship, and who was considered to have fairly intended to restore the *British* ship to her owners, the owners were directed to protect him against the bills drawn for the purchase, and also to pay him a sum of money equal to about *one-seventh* of the value after deducting the purchase-money (r).

In the case of a slave-ship rescued from insurgent slaves on the coast of *Africa*, by another vessel employed in the same trade, *one-tenth* of the value was allowed (s). In the case of a *Danish* ship, deserted by its crew on the *English* coast, and brought into *Harwich* without any considerable danger, *two-fifths* were decreed for salvage (t). In the case of another ship, which having struck

(o) *H. M. S. Thetis*, 3 Hag. Ad. Rep. 14; 2 Knapp, p. 390.

(p) *The Dorothy Foster*, Sowden, 6 Rob. Ad. Rep. 88.

(q) *The Progress*, Barker, 1 Edw. 210; *the Race-horse*, 3 Rob. Ad. Rep. 301.

(r) *The Henry*, Hannay, 1 Edw. 192.

(s) *The Trelawney*, Lake, 4 Rob. Ad. Rep. 223.

(t) *The Fortuna*, Quest, 4 Rob. Ad. Rep. 193.

upon a rock, lost her rudder, had her bottom beaten in, and been deserted by the crew, was weighed off with great peril by one set of persons, and placed in such a situation as to enable the master to bring off some bullion, but which afterwards sunk, and was again weighed up and brought into *Harwich* by another set of persons, *two-thirds* were decreed, and the amount distributed rateably among the first and second set of salvors (*u*). Where the master of a whaler and a boat's crew of five men had gone, at the imminent peril of their lives, to assist a vessel dismasted, with the water making a breach over her, when they assisted in rigging a jury-mast, and afterwards towed the vessel during six days to *Plymouth*, the Court awarded 1,200*l.* out of a value of 7,000*l.* (*v*). In another case, where a ship with government stores was preserved by thirty-two salvors at great risk to all, and with loss of life to three, besides damage to and loss of boats, the owners of the ship estimating her at 1,500*l.*, tendered 400*l.* as salvage for the ship and freight. The stores were valued at 5,000*l.* The Court adopting the tender, gave 900*l.* in addition for the stores, making together a salvage of about *one-fifth*, and apportioned the sum among the surviving salvors and the families of those who perished (*w*). In another case, where a captured ship had been deserted by the captors and was recovered and saved with great risk, trouble and discretion, a moiety was given (*x*). The Court of Admiralty will give as much encouragement as possible to a steam-boat assisting in the preservation of property in danger, or actual apprehension thereof, on account of the great skill and the great power of vessels of this description (*y*). But the Court will not suffer a claim of salvage to be ingrafted on the local ignorance of foreigners, who cannot be expected to be well acquainted with our coast, although a recompense must be made for the service actually rendered to them (*z*). Neither is a passenger entitled to make a claim for the ordinary assistance he may be enabled to afford to a vessel in distress; it being the *duty*, as well as the interest of all persons on board of every description, to contribute

(*u*) *The Jonge Bastiaan*, Steyting, 5 Rob. Ad. Rep. 322.

(*v*) *The Jane*, Hudson, 2 Hag. Ad. Rep. 338.

(*w*) *Marquis of Huntley*, Mollison, 3 Hag. Ad. Rep. 246.

(*x*) *The Elliotta*, 2 Dod. Ad. Rep. 75.

(*y*) *Raikes*, Gardiner, 1 Hag. Ad. Rep. 246.

(*z*) *The Vrouw Margaretha*, Jacobs, 4 Rob. Ad. Rep. 103.

their aid on such an occasion (a). A passenger, however, is not bound to remain on board the ship in the hour of danger, but may quit it, if he has an opportunity to do so: much less is he required to take upon himself any responsibility as to the conduct of the ship. And, therefore, in the following case a passenger was permitted to recover a very considerable sum for extraordinary services performed, and responsibility incurred. A ship bound to the *West Indies* struck upon the shoals of *Chichester*, in a gale of wind, and in that situation was deserted by the master, who took part of the crew with him. A person who had commanded vessels in the same trade, and was then on board as a passenger, took the command of the ship, by the desire of the passengers, and with the consent of the mate and the remainder of the crew, and carried her back in safety to *Ramsgate* harbour. The owner approved of his conduct, and in a letter to the underwriters attributed the preservation of the ship to his skill and management, and intimated that he thought 200*l.* the lowest compensation that could be made to him; this was done under an expectation that the remuneration might form a part of a general average. At the trial of the cause, the Chief Justice, Lord *Alvanly*, said he was inclined to think the plaintiff was entitled to be paid something for his service, as he appeared to have placed himself in a situation of responsibility, and would have been answerable for neglect or misconduct. The jury gave 400*l.* An application was made to the Court of Common Pleas in the ensuing term to set aside the verdict, but the Court refused to do so (b). § Where two vessels sailed as consorts under an agreement, usual in the *Greenland* fishing service and in other voyages, to render mutual assistance, the Court refused to entertain a claim of salvage for services rendered by one to the other (c). And where the master of a vessel in distress contracted with the master of another vessel for assistance for a sum certain, a claim for salvage by the latter was rejected (d). But loose conversations at the commencement of the service and before its extent could be known, will not be considered conclusive of the merits of the case, or the quantum of reward (e). §

(a) *The Branton, Wilson*, 2 Hag. Ad. Rep. 3.

(b) *Newman v. Walters*, 3 Bos. & Pull. 612.

(c) *The Zephyr, Arrowsmith*, 2 Hag. Ad. Rep. 43; *the Margaret, Kay*, 2 Hag.

Ad. Rep. 48; *the Waterloo*, 2 Dods. 423; *the Trelawney*, 4 Rob. Ad. Rep. 223.

(d) *The Mulgrave, Garbutt*, 2 Hag. Ad. Rep. 77.

(e) *The Selacia, Garland*, 2 Hag. Ad. Rep. 262.

If a hired transport, under the care of a master appointed by the owner, be brought into difficulty in the execution of a service in which men-of-war and transports are associated, a man-of-war is bound, if it be in his power, to extricate the transport, and can have no claim in the nature of salvage for the performance of his *duty* (*f*). So, also, if part of the crew mutiny, and obtain a temporary possession of the ship, and another part afterwards attack and overpower the mutineers, and recover the ship, the latter cannot maintain a suit for *salvage*, because their conduct, though meritorious, is only the performance of a *duty* incumbent on them (*g*).

3. But although by the law of *England*, there is an obligation upon king's ships to assist the merchant vessels of this country, still a king's ship may be entitled to an adequate reward for services performed by her (*h*).

§ In the case of the *Lustre* (*i*), *Finlay*, value 1100*l.*, to the assistance of which, on the application of her owners, his Majesty's steamer, *Dee* had been dispatched, by order of the admiral at *Portsmouth*, "upon the express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or 'damaged,'"—it was alleged, that this stipulation barred the officers and men from all claim to salvage. Sir *John Nicholl* said, "It is a mistake to suppose that the public force of the country is to be employed gratuitously in the service of private individuals, merely to save them from expense. These government steam-vessels are kept for the public service, and the officers in command cannot employ them in the service of individuals, and thus risk the public property, without authority, or an indemnity for all expense and damage. Here there was a stipulation given, upon the admiral at *Portsmouth* allowing the *Dee* to be so employed; but it has nothing to do with a reward for personal service: it was never so intended, and cannot, on principle, be so maintained. There might in the service have been a great exposure of life, and there was much of risk and labour. Why are officers and crews to hazard their lives or undergo labour to save the owners of merchant ships from the expense of hiring private steamers, or resorting to other means? I am clearly of

(*f*) *Belle, Betts*, 1 Edw. Ad. Rep. 66. See also the *Francis and Eliza*, 2 Dod. Ad. Rep. 115.

(*g*) *Governor Raffles, King*, 2 Dod. Ad. Rep. 14.

(*h*) *Mary Ann, Ferrier*, 1 Hag. Ad. Rep. 158; the *Clifton, Lightbody*, 3 Hag. Ad. Rep. 117.

(*i*) 3 Hag. Ad. Rep. 154.

opinion, that officers and men so employed, and who perform essential service, are entitled to reward as much as in the case of re-capture. In that description of cases, they receive less than the law gives to privateers; so here, the condition to reimburse all expenses in case of damage, is a reason for a less reward than when a steamer goes out on private risk and enterprize. The only question is, the quantum: 100% is as little as I can give, and the expenses."

In a subsequent case (*j*) of salvage, by a government steamer and two hundred men, it appeared that the *Ewell Grove* was in extreme danger on a shoal off *Jamaica*, where she had been for three days, when signals of distress brought the steamer to her assistance. In about eight hours afterwards, the *Ewell Grove* was moored in safety, and on the next morning towed into *Carlisle Bay*. The Court, on a value of 6000*l.*, gave 1200*l.* and costs.

4. The apportionment of salvage among the persons engaged in the salvage service, and the nature and amount of service which establish a title to share, often give rise to questions of considerable difficulty. The general principle is, that all shall share in the reward who have contributed to the safety of the property upon which it is assessed.

A ship, deserted by her master and crew, was taken possession of in a state of *derelict* by a sloop of war and a transport, and, after great exertion on the part of both, was brought into port. "In no instance," said Lord *Stowell*, "except where the crown alone has been concerned, and where no claim has been given for a private owner, has more than one-half been decreed by way of salvage. As this property is valuable, the nett proceeds of the ship, cargo, and freight amounting to more than 12,000*l.*, there seems no reason for going beyond this rule upon the present occasion. I have no doubt of allowing a moiety; and the only question then is, respecting the apportionment between the salvors, of the sum so allotted. Now, the king's ship is, I think, to be deemed the principal salvor; the commanding officer of the ship having presided on the occasion, and given the necessary directions as to the best and most efficacious mode of saving the property; but it must, at the same time, be taken into consideration, that the chief part of the labour lay upon the crew of the transport. In order to make an equitable division between the parties entitled, it appears to me that some reference should be had to the

(*j*) The *Ewell Grove*, Barton, 3 Hag. Ad. Rep. 209.

number of persons on board each of the ships. The crew of the transport, it should seem, consisted of thirty-six men; and though it does not appear from any evidence in the cause what might be the exact number on board the king's ship, yet, judging from the size of the *L'Espègle* (the sloop), and from the number of hands usually allotted to vessels of the same rate and description, the probability is, that there were from ninety to one hundred and twenty men on board that ship. Without entering into any very minute distinctions upon this point, I shall direct three-fourths of the salvage money to be paid to the commander, officers, and crew of the sloop *L'Espègle*, and the remaining one-fourth to the master, officers, crew, and owner of the transport vessel" (k).

The *American* ship *Baltimore*, laden with a valuable cargo, in the prosecution of a voyage from *Liverpool* to *Baltimore*, in *America*, met with very tempestuous weather, and being reduced to a state of helpless distress, not only by the damage she had sustained, but by the illness and exhaustion of her crew, fell in with the *Rapid*, a post-office packet. The captain of the packet having, at their earnest solicitation, taken the *American* master and crew on board his ship, inquired of his own officers and company whether they were inclined to volunteer their services, and endeavour to save the vessel and cargo. With the exception of one man, they all expressed their readiness for the service; and the mate and ten of the packet's crew were sent on board the *Baltimore*, taking with them a supply of the necessary articles for the use of that vessel, and succeeded in bringing her in. The value of the property saved was 1900*l*. In a suit for salvage, an exclusive right was set up by the mate and his companions, who went on board the *Baltimore*, and a claim of participation was made by the captain and the remainder of the crew, and also by the owners of the packet, in respect of stores supplied to the distressed ship. The value of the property saved was about 1900*l*. Lord *Stowell*, after awarding 800*l*. for salvage, said, "The next question is, amongst whom, and in what proportion, this sum shall be divided. There can be no doubt whatever, that the claim of the captain of the *Rapid* is well-founded, for he is the life and soul of the whole business. His right to reward is indisputable; and I shall give him the sum of 100*l*., to which I think he is justly entitled, as to a sort of *flag-eighth*. With respect to the

(k) *L'Espérance*, 1 Dods. Ad. Rep. 46.

contest between those who went on board the *Baltimore*, and became the immediate instruments of preserving her, and those who remained on board their own ship, I confess I can see no sufficient ground for making a distinction between them, and consider it but fair to hold that they are all equally entitled to be rewarded. All of them, it is true, did not go on board the *Baltimore*; but they were all (with one exception) ready to do so, and a selection of part of them became necessary, which was accordingly made—and, I have no doubt, properly made—by their commander. As all of them concurred in their readiness to go, they are all equally deserving of reward. It must be admitted that the mate is entitled to a considerable reward for the services he performed, and I shall therefore give him 80%. The rest I shall distribute equally amongst the crew of the packet, with the exception of the man who refused his services; and his share, under the circumstances, ought to be given to the carpenter, in addition to his own share. With respect to the claim of the owners of the packet, they are certainly entitled to receive the value of the sails and stores which were supplied from their vessel, and also the amount of any other loss or expense which they may have fairly incurred."

In a case above cited, it appeared that his Majesty's ship *Thetis*, employed in bringing specie from *South America*, sailed from *Rio de Janeiro* on the 4th of *December*, 1830, and was wrecked on the 5th, off *Cape Frio*, when she drifted into a cove surrounded by high rocks, and sunk, with treasure to the amount of above 810,000 dollars. When the news of this disaster reached *Rio*, Admiral *Baker*, the commanding officer of the *British* squadron on that station, proceeded to the spot, surveyed the localities, collected all the information that could be obtained, and stationed a vessel, the *Algerine*, to guard the wreck. On his return to *Rio*, the possibility of recovering any part of the property engaged Admiral *Baker's* attention. The subject excited general interest at *Rio*, among the *British* officers and others, and particularly in the mind of Captain *Dickinson*, who formed plans and constructed models for that purpose. Captain *Dickinson* submitted these plans and models to Admiral *Baker*, or he was sent for and consulted by the admiral, and was eventually appointed by the admiral to undertake the recovery of the stores and specie. On the 24th *January*, two months after the accident, and one month after the purpose of recovering the stores and specie had been entertained, and the means devised in communication with the admiral, Cap-

tain *Dickinson* sailed from *Rio de Janeiro* to effect that object. In the mean time, all the assistance that could be afforded by concerted measures had been supplied. Stores and men had been furnished from other ships. Two vessels were put under Captain *Dickinson's* command. A net to inclose the cove, and a suspension cable, had been proposed by the admiral, and constructed from the public stores; and other things, to a small amount at least, had been procured at the admiral's cost. There was much dispute as to whom the merit of particular contrivances and inventions used in the service was due; but the result was, that the admiral had done every thing that an active and intelligent commander could do to promote and forward the enterprize, and that Captain *Dickinson*, by his ingenuity and exertions, fully justified the choice which had been made of him as the *dux facti*, or person to whom the immediate command of the enterprise was entrusted. •

A large amount of treasure was recovered; and the question was, whether the admiral or Captain *Dickinson* was to be considered as the principal salvor, and whether the former could be considered to have rendered such effective assistance as would entitle him to claim anything in the character of salvor.

"Salvage," said Sir John *Nicholl*, "in it's simple character, is the service which those who recover property from loss or danger at sea, render to the owners, with the responsibility of making restitution, and with a lien for their reward. It is personal in its primary character, at least; and those who are so employed in the service, are those whom the law considers as standing in the first degree of relation to the property and to the proprietors. This is necessary for the protection of the owner, who ought not to be burthened with artificial claims, and it is the natural mode of tracing effects to their efficient causes; for by whom can the service be said to be ostensibly performed, but by those who recover the thing, and on whom can the duty of restoring it lie, but on those who actually regain the possession? These are the principles on which the Court proceeds in compelling restitution, when necessary, or in assigning a reward. It looks primarily to the actual salvor, and has uniformly rejected all claims founded on prerogative rights, as of the Lord High Admiral in former times, of lords of manors, of magistrates, and of flag-officers, except with reference to assistance substantially and beneficially afforded. Captain *Dickinson* stands indisputably in the character

of actual salvor, but his claim rests upon some averments that are not, in my view of the case, agreeable to the facts. He says, he was entirely dependent on his own skill and resources, and was in effect wholly uncontrolled in the direction of the salvage service, and never received from the Admiral instructions in what manner the treasure was to be recovered. So far as it is meant to represent his acts as entirely independent of the admiral, I must say the log, and the journal, and his own correspondence describe a service of a very different kind. The history of his appointment and recalls, the demand for supplies of naval stores, the compliance with those demands on the responsibility of the admiral when necessary, the constant communication, if not submission of all his plans and intentions for the admiral's approbation and sanction, and the entire want of means to effect the service by his own resources alone, bespeak a case quite at variance with this averment, and quite out of the ordinary class of independent and individual service.

“ It is alleged also on his behalf, ‘ that there is no principle of constructive assistance in civil salvage, and that no admiral or commanding officer of a station, not being an actual salvor, but merely by virtue of such command, has any right to claim to share in the salvage earned by, and awarded to, a ship belonging to such station.’ There is no difficulty in acceding to this proposition, as expressed in these terms. What is earned by or awarded to a ship, will not be disturbed by secret constructive claims; but that will not exclude a claim from being propounded on behalf of an admiral on special grounds of extensive contribution of assistance; and in regard to the description of the admiral's service in this case, as mere constructive assistance, I think it went much beyond that, and what is proposed as the test of that principle, the performance of mere official duties. I shall not undertake to define precisely what that line is, nor shall I enter into a scrupulous examination of what such an officer might be required to do in other cases. The services which Admiral *Baker* represents himself to have performed, beyond the disputed merit of originating and directing the service, are, that he furnished men and stores from the ships on his own responsibility, and procured some things at his own cost and credit. It is objected, however, that Admiral *Baker* made no considerable advances till the adventure had become productive; but it is admitted that he authorized Captain *Dickinson* to procure some articles to the amount of 100%,

and we may infer from this admission what he was disposed to do if necessary. It was material also as indicating the general understanding of the parties on this subject. The admiral also made insurances, and kept up a correspondence with the underwriters in this country, and with the *Admiralty*; and it does not appear to me that he obtained from either any funds or assurance of indemnity. The letters from the *Admiralty* of the 19th of *February*, and 11th of *August*, 1831, have been exhibited; and they imply that Admiral *Baker* was considered by the *Admiralty* as intimately connected with the operations; they refer him very much to his own judgment and discretion as to what might be proper to be done, saving only, says the latter despatch, 'that the public were not to be put to any expense by the endeavours to save the treasure, beyond the use of the ships and crew, when the service would admit of it.' This letter alone, if it were necessary to rely upon it, would, I think, be almost sufficient to give a special character to this service. It invests it, as to the salvors, with some degree of public authority, and imposes on the admiral the responsibility of doing what was proper, with very little assistance or direction either from the underwriters, representing the owners, or the government; I think, that the responsibility was very beneficially discharged. Had there been any intrusion on the rights or interests of the owners in this act of the government, it might have been a good ground of objection on their part, and might have affected the whole question; but the contrary was the fact. The underwriters were in communication with the *Admiralty*, and appear to have been privy to all that was done. If then admirals can be entitled at all, for anything but mere personal presence and exertion, it must be for such services as these, which were infinitely more conducive to the success, than the admiral's own personal presence could in this instance have been. The case of the *Aquila*, which has been so much relied on, seems to admit that some services might have entitled even a magistrate, though it is not said what they should have been. It would be saying nothing to require personal service; since, then, such persons would not be distinguished from any other. The exception supposed in that case is, in my judgment, very applicable to the present, as authority for what I am disposed, on the effect of general principle alone, to hold, and on these observations I shall pronounce that Admiral *Baker* is entitled to share as having contributed effective assistance; and deeming it expedient, in a case

of novelty, to act as far as I am able on rules and principles established in analogous cases, and thinking that the proportion allowed in other civil cases will not be unfit to be applied to this, I shall adopt the rule of the prize proclamation."

This case was one of extraordinary service, requiring great resources, much previous preparation, and assistance, without which the personal exertions of the actual salvors could have produced no beneficial result. It must be considered rather as an exception to the general rule—that those only who were actually occupied in effecting a salvage service are entitled to share in a salvage remuneration.

The ship *Vine* (1), in distress near the *Needles*, was assisted for three days and nights, and finally towed into *Portsmouth* by thirty sailors, eight of whom were employed on the Coast Guard Service, under the command of Lieutenant *Porter*, R. N., who did not accompany them. A separate claim of salvage being made for this officer, it was alleged on his behalf, "that his men" had proceeded, under his directions in the revenue galley to the assistance of the vessel, that he gave them instructions, and also sent off a pilot-boat to aid their exertions.

Lord *Stowell* said, "If this case what did Lieutenant *Porter* do? He permitted the men, under his command, to perform with the boats a salvage service; and on the ground of policy I think that officers of the Preventive Service should suffer their boats to assist vessels in distress; but such a permission may have its inconveniences, and it may sometimes be a matter at least for consideration, how far the men employed in protecting the revenue, ought to be allowed to quit the particular service for which they are engaged. The nature and duties of this arduous service are a sufficient reason for Lieutenant *Porter* not going out in person with assistance to this vessel; but to acknowledge him as a salvor would be to introduce a sort of prize principle very inapplicable to cases of this description. In cases of prize a commander on shore, if the capture takes place within the limit of his station, is considered as the manager of the whole transaction, and the property being condemned, he is entitled to his proportion; but in questions of salvage the Court must not act upon the same liberality of principle that belongs to prize cases. Here all is to be paid out of the pockets of the *British* owner; he alone is to pay all demands. The application, I repeat, is

(1) *The Vine*, Jay, 2 Hag. Ad. Rep. 2.

novel and in dismissing it, I go as far as I can in allowing Lieutenant *Porter* his expenses."

There is, however, one exception to the rule above stated in favour of owners of vessels, which in rendering assistance have either been diverted from their proper employment, or have experienced a special mischief, occasioning delay, injury, and loss, for which equitable compensation is frequently awarded by the Court of Admiralty (*m*). "As to the owners," said Sir *Christopher Robinson*, in the case of the *Jane* (*n*), before cited, "the general principle of law is, that their claim is very slight, unless from the circumstances of the case, their property becomes exposed to danger, or they incur some real loss and inconvenience. There was no danger to their property in this case; but in the detention of their vessel, and consequential risk and expenses, I think there is strong foundation on their part for a claim to share in the salvage." In one case, where the sum of 4,000*l.* was allowed for salvage, one-half was allotted to the owners of the assisting vessel, on the ground of the injury she had sustained, by the great weight of the articles saved, and the risk she ran of vitiating her insurance by increasing the peril of her voyage (*o*). Upon the same principles, in the case of the *Thetis* (*p*), the claim of the Commissioners of the Admiralty to share in the salvage reward, in respect of the wear and tear of the vessels employed in the salvage service, and the stores supplied to them was admitted. It is not necessary for salvors, in order to maintain their rights, to remain on board the vessel which has received their assistance (*q*).

5. If the preservation of life can be connected with the preservation of property, whether by accident or not, the Court of Admiralty can take notice of it, but has no power of remunerating the mere preservation of life, which must be left to private bounty (*r*). In a recent case (*s*), a suit for salvage by two fishing smacks against the *Ardincaple* steam packet, it appeared that the *Ardincaple* sailed from *Louth* on her voyage to *Newcastle*, with thirty-two passengers, and a crew of eight on board. The weather soon became boisterous, and when between *Holy*

(*m*) *The Vine*, Jay, 2 Hag. Ad. Rep. 1; the *Mulgrave*, Garbutt, 2 Hag. Ad. Rep. 77; the *Salacia*, Garland, 2 Hag. Ad. Rep. 262.

(*n*) *The Jane*, Hudson, 2 Hag. Ad. Rep. 338.

(*o*) *The Waterloo*, 2 Dods. Ad. Rep. 436.

(*p*) Ante, p. 497—503.

(*q*) *Eleanora Charlotta*, Osterman, 1 Hag. Ad. Rep. 156.

(*r*) *The Aid*, Teasdel, 1 Hag. Ad. Rep. 156.

(*s*) *The Ardincaple*, M'Leod, 3 Hag. Ad. Rep. 151.

Island and *Bamburgh Castle*, a heavy sea struck the vessel and carried overboard every thing on deck. Seven seamen, including the master, were drowned, and afterwards two more seamen, washed out of the boat a-stern, were also drowned. The vessel became unmanageable, and was with great difficulty, under the directions of a passenger, brought to an anchor within two miles of a lee shore. While in that state, the sea breaking over her chimney, with mainmast and bowsprit gone, she parted from both her anchors and drove out to sea. The crew, having rigged a jury-mast with tarpaulins, she made signals of distress to several vessels at the *Fern Islands*, but no vessel came out except the *smacks*; one of which took, with considerable difficulty, all her passengers on board, and both taking her in tow brought her into *Shields*. Sir John Nicholl, on a value of £1265, awarded £350 to the salvors, and said, "The *smacks* were at anchor, sheltered from the storm, they went out with great enterprise and alacrity; one of them even slipping her cable. The vessel saved was in a most perilous state: it is difficult to suppose one more so. There was also great risk in taking the passengers out of this unmanageable vessel, for though the storm had abated, the sea was much swollen and agitated, and therefore a meritorious service was performed in extricating them, the vessel being then twelve miles from the shore.

"It is true that the ship and cargo are of no great value, but in the case of steam-boats, that is not the consideration; they are a very peculiar species of vessels, making large profits, and they are not merely to pay for services, as if only carrying ballast; humanity requires that every possible encouragement in the way of liberal reward should be given, in order to induce a prompt and efficient assistance to them, and the reward must be beyond a mere proportion of value in ordinary cases."

6. With respect to the parties liable to pay salvage, and the interest in respect of which it is payable, the rule is that the property actually benefited is alone chargeable with the salvage recovered. If at the time of the salvage service the earning of freight has commenced, and it be afterwards actually earned, it is liable to pay salvage as well as the ship and cargo. (†).

A chartered ship at a monthly freight was captured and recaptured on her homeward voyage. The owner and charterers having respectively made claim to ship and goods in the Admiralty

(†) *The Dorothy Foster*, 6 Rob.^d Ad. Rep. 88. *The Progress*, Edw. Ad. Rep. 210.

Court, restitution was decreed to them on payment of salvage, which was paid by the charterer from the sale of the goods. Part of the freight having been paid, the proceeds of the goods fell short of the residue, and it was held in an action by the shipowner to recover it, that he alone, in respect of the freight, was liable to the whole salvage, and that the charterer might set off the amount he had paid for salvage, against the shipowner's demand for the freight unpaid (s).

"The principle," said Lord *Ellenborough*, "upon which freight is to contribute in the case of general average is, that it was one of the things in hazard at the time when that sacrifice which produced the general average was made, and the principle upon which it contributes in the case of salvage is, that but for the recapture, for which the salvage is paid, it would have been lost. Salvage is a compensation to the salvors, not merely for the restitution of the property which has been made by them to the prior owners, (for that is properly an act of mere justice on their part), but for the risk and hazard incurred by them, and for the beneficial service they have rendered the former owners in rescuing that property from the danger in which it was involved, and the persons to contribute to that salvage are the persons who would have borne the loss had there been no such rescue, and who of course reap the benefit of that rescue. To form a judgment who would have borne the loss had there been no rescue, and to whom the rescue was beneficial, we must look to the interest which each party had. The plaintiffs had an interest in the hull of the ship, as shipowners, to the extent of the value of the ship, and they had also an interest in the arrival of the ship at *London* to the extent of the freight, which would have been due to them in that event, which was 16,145*l.* 13*s.* 7*d.*, and the defendants were interested in the goods to the amount of 14,351*l.* 18*s.* 2*d.*, but as the ship's arrival would subject them to the payment of the 16,145*l.* 13*s.* 7*d.*, the loss by the capture would have been on the whole a beneficial event to them, and they of course derived no advantage, but on the contrary received a prejudice by the event of the rescue. The salvage, therefore, though computed upon ship and cargo, ought to be borne wholly by ship and freight, which is to be received by the shipowners, and the cargo ought to contribute nothing. It is very true that by this means the freight is made to bear that salvage,

(s) *Cox v. May*, 4 M. & S. 152.

which was paid to the recaptors in respect of the cargo saved, and the shipowner has a much higher salvage to pay than would have been the case had the ship returned in ballast; but as it was in the contemplation of all parties that the ship was to come home loaded, the shipowners have no right to complain of any consequence which results from what was so contemplated; and if the plaintiffs are alone benefited by the recapture, they must bear the whole amount of the salvage, whatever that may be. They must, therefore, bear the whole of the sum, 2,312*l.* 0*s.* 6*d.*"§

7. When a well-founded claim of salvage has been entered in the Court of Admiralty, the proper course to be pursued by the defendants, in order to save the expense of further proceedings, is to tender, in the first stage of the cause, by *acts of Court*, and not personally and verbally to the claimants, a specific sum for the salvage, accompanied by an offer to pay the costs incurred. The Court will then consider of the sufficiency of the sum tendered, and if it shall be thought sufficient, will make the party, who refuses the offer, liable not only to his own costs, but also to the costs of the other side, if it shall appear that the proceedings have been vexatiously pursued (*t*).

8. In the case of valuable property, and numerous proprietors and salvors, the jurisdiction and proceedings of this Court are admirably adapted to the purposes of justice. But as the delay and expense necessarily incident to the proceedings of a high tribunal, sitting at a distance from the subject in contest, will often be injurious to the parties, the legislature has endeavoured to introduce a more expeditious and less expensive mode of adjustment. For this purpose several provisions have been at different times made by the legislature; *first*, by a statute passed in the reign of Queen Anne (*u*), which, however, is confined to the case of assistance rendered to ships in distress by or under the direction of certain public officers and persons therein mentioned; *secondly*, by another statute passed in the reign of George the Second (*v*), by which the first act was in some respects improved, and which also provided for the case of assistance *voluntarily given* by persons not employed for that purpose; afterwards, by a statute passed in the reign of George the Third (*w*), which provides for the case of

(*t*) The *Vrouw Margaretha, Jacobs*, 4 Rob. Ad. Rep. 103. See also the *Eleanora Charlotta, Osterman*, and the *John and Thomas, Baxter*, 1 Hag. Ad. Rep. 156, 157.

(*u*) 12 Anne, stat. 2, chap. 18.

(*v*) 26 Geo. 2, chap. 19.

(*w*) 48 Geo. 3, chap. 130, sect. 21 and 22; 1 & 2 Geo. 4, c. 76.

assistance *given at the request of the persons belonging to the ship*, without the intervention of the public officers or persons mentioned in the *first* statute; and also contains several regulations applicable to minor services and cases not within the former statutes: and further, by other statutes passed in the same reign (x), and in the reign of *George the Fourth* (y). I propose to detail these legislative provisions at some length: *but I must premise that they do not apply to the Cinque Ports*; those ports have been made the subject of distinct enactments, which will be noticed afterwards (z).

9. In the first place, in all parts of *England, except the Cinque Ports*, all sheriffs, deputy sheriffs, justices of the peace, and all mayors, bailiffs, and other head officers of corporations and port towns near the sea, coroners, commissioners of the land-tax, constables, headboroughs, tithingmen, and officers of the customs or excise, upon application made to any of them, by or on the behalf of the chief officer of any vessel belonging to the king's subjects, or *others*, in danger of being, or actually being, stranded or run on shore, are empowered and required to command the constables of the ports nearest to the coast, to call together as many men as shall be necessary to the assistance and for the preservation of the distressed ship and its cargo; and if any other ship belonging to the king, or his subjects, happens to be riding at anchor near the place of distress, the officers of the customs, and constables, or any of them, are empowered and required to demand of the superior officer of such ship assistance by his boats, and such hands as he can conveniently spare; and if such superior officer refuses or neglects to give such assistance, he forfeits 100*l.*, to be recovered by the superior officer of the ship in distress, with costs of suit in any Court of record (a).

10. And to prevent confusion among the persons assembled, either for want of proper orders, or by contradictory orders, they shall conform, in the first place, to the orders of the master, or other officers or owners, or the persons employed by them; and

(x) 53 Geo. 3, c. 87.

(y) 1 & 2 Geo. 4, c. 75.

(z) By the Statute 39 & 40 Geo. 3, p. 1. and p. c. x. some provisions are made for adjusting the salvage of anchors, cables, &c. found in the river

Humber. The same act regulates the pilotage to and from the port of Kingston-upon-Hull.

(a) 12 Anne, stat. 2, c. 18, s. 1, and 26 Geo. 2, c. 19, s. 9.

for want of their presence and directions, to the orders of the persons authorised to execute these statutes in the following subordination, as they happen to be present; namely, officer of the customs, officer of excise, sheriff or his deputy, justice of the peace, mayor or chief magistrate of a corporation, coroner, commissioner of the land tax, chief constable, petty constable or other peace officer; under the penalty of 5*l.* for wilful disobedience of such orders, to be levied by warrant of a justice.

11. The high sheriff, by the common law, and by the statute (b), in case of need, and in the absence of the high sheriff, any justice of the peace may take sufficient power of the county, to repress all unjust violence, and duly to enforce the execution of the statute. And the commander of the ship in distress, or officer of the customs, or constable on board the same, may repel by force persons who, without their consent, press on board the ship, and thereby molest them in its preservation (c).

12. And for the information of persons interested, who may happen to be absent, the officers of the customs shall, as soon as convenient, cause all persons belonging to the ship, and others, who can give an account thereof, or of the cargo, to be examined upon oath before some justice of the peace, as to the name or description of the ship, the names of the master and owners, and of the owners of the cargo, and of the places of departure and destination, and the occasion of the ship's distress; which examination the justices are to take down in writing, and to deliver a copy thereof, with a copy of the account of the goods, to the officer of the customs, who shall transmit the same to the secretary of the Admiralty, who shall publish in the next *London Gazette* so much thereof as shall be necessary for the information of the persons interested (d).

13. And for the encouragement of persons who give their assistance, and for adjusting their reward, the first statute (e) provides, that the officers of the customs (f), master of any ship, and all others who shall act or be employed in the preservation of ship or goods, shall, within *thirty days*, be paid a reasonable reward by the master, mariners, or owners of the ship in distress, or the

(b) 26 Geo. 2, c. 19, s. 13

(c) 12 Anne, stat. 2, c. 18, s. 3.

(d) 26 Geo. 2, c. 19, s. 15.

(e) 12 Anne, stat. 2, c. 18, s. 2.

(f) The words of the act are "the said collectors," but collectors have not been named before.

merchant whose ship or goods shall be saved; and in default, the ship or goods saved shall remain in the custody of the officer of the customs, or his deputy, until the persons employed shall be reasonably gratified, or good security given for that purpose to their satisfaction; and in case, after such salvage, the superior officers, mariners, or owners of the ship saved, or merchant whose goods shall be saved, shall disagree with the officers of the customs, or his deputy, touching the monies deserved by any of the persons employed, the commander of the ship saved, or owner of the goods, or merchant interested therein, and the officer of the customs, or his deputy, may nominate *three* of the neighbouring justices of the peace, who shall thereupon adjust the quantum of gratuities to be paid to the several persons acting or being employed in the salvage; and such adjustments shall be binding on all parties, and shall be recoverable in an action at law, to be brought in any court of record by the respective persons to whom the same shall be allotted. And in case it shall happen that no person shall appear to make his claim to all or any the goods that shall be saved, then the chief officer of the customs of the nearest port to the place where the ship was in distress, shall apply to *three* of the nearest justices of the peace, who shall put him or some other responsible person in possession of the goods, such justices of the peace taking an account in writing of the goods, to be signed by such officer of the customs; and if the goods shall not be legally claimed within the space of *twelve months* next ensuing, by the rightful owner thereof, then public sale shall be made thereof; and if perishable goods, shall be forthwith sold, and after all charges deducted, the residue of the monies arising by such sale, with a fair and just account of the whole, shall be transmitted to the Exchequer; there to remain for the benefit of the rightful owner *when appearing*; who, upon affidavit or other proof, made of his right or property thereto, to the satisfaction of one of the Barons of the coif of the Exchequer, shall upon his order receive the same out of the Exchequer.

But this statute not containing a provision for adjustment of the salvage, if the contending parties could not agree in the nomination of justices, nor providing any method of raising money immediately for payment thereof, and being defective in other respects, the second statute (*g*) provides, that the justice of the

peace, mayor, bailiff, or collector of the customs, or chief constable, who shall be nearest to the place where any ship or goods shall be stranded, shall forthwith give public notice for a meeting to be held as soon as possible of the sheriff, or his deputy justices of the peace, chief magistrates of towns corporate, coroners, and commissioners of the land tax, who, or any five or more of them, are required and empowered to examine persons upon oath, adjust the quantum of salvage, and distribute the same among the persons concerned; and the sheriff and other persons before mentioned, attending and acting at the meeting, shall each be paid *four shillings* a day (*h*) for his expenses in such attendance, out of the effects saved.

And if the charges and rewards of salvage directed to be paid by these statutes shall not be paid, or sufficient security given for the same, within *forty days* next after the services performed, the officer of the customs concerned in the salvage may borrow and raise as much money as shall be sufficient to pay such charges and rewards, or any part thereof then remaining unpaid or unsecured, by bill of sale, under his hand and seal, of the ship or cargo saved, or a sufficient part thereof, redeemable, nevertheless, upon payment of the principal borrowed, and interest at *four per cent.* (*i*).

14. The provisions before mentioned applying only to the case of services performed under the orders of persons authorized to give directions in this respect: it is further directed by the second statute (*j*), that in case any person or persons, not employed by the master, mariners, or owners, or other persons lawfully authorized, in the salvage of any ship, or the cargo or provision thereof, shall, in the absence of persons so employed or authorized, save

(A) This is the sum appointed to be paid to the justices for their attendance at the Quarter Sessions, by a statute made in the 12th year of the reign of Richard 2, A.D. 1388, and which still continues, although so utterly inadequate in the present times. But experience shews that the gentlemen of the country are induced to discharge the important office of magistrates by the most honourable motives, and without expecting a remuneration even of their actual expenses.

(i) 26 Geo. 2, c. 19, s. 7.

(j) 26 Geo. 2, c. 19, s. 5. By 6 Geo. 4, c. 105, s. 100, so much of this act of the 26 Geo. 2, as relates to the revenue of the customs is repealed; it seems difficult to say what or how much that may be. This fifth section of the 26 Geo. 2, is referred to in the margin of the repealing act. Perhaps the repeal was intended to introduce the 47th and 48th sections of chap. 107, relating to the sale of goods to defray salvage duty free.

any ship or goods, and cause the same to be carried for the benefit of the proprietors into port, or to any adjoining Custom-house, or place of safe custody, immediately giving notice thereof to some justice, magistrate, custom-house or excise officer, or shall discover to any such magistrate or officer, where any such effects are wrongfully bought, sold, or concealed, such person shall be entitled to a reasonable reward, to be paid by the master or owner of the vessel or goods, and to be adjusted, in case of disagreement about the quantum, in the same manner as salvage is to be adjusted either by the first or latter statute, as the case shall require.

The case of salvors acting "under and by the mere employment and authority of the commander or other superior officer, mariners, or owners of any ship or vessel in distress," where no application was made to the public officers mentioned in the first statute, being unprovided for; it was afterwards enacted, that all the means which subsisted by virtue of that statute, and might by law be applied for the recovering and adjusting the quantum of salvage in cases within it, should be applicable and available in this case also; and if the commander or other superior officer, mariners, or owners of the ship so saved, or the merchant, or other person whose goods shall be saved, or their agents, should disagree with the salvors, as to the quantum of the gratuity; the commander of the ship, or the owner of the goods, or the merchant interested therein, or their agents, and the salvors, might nominate three of the neighbouring justices of the peace to adjust it; and if the parties should disagree in the nomination, any one of the parties might apply to one such justice, who might nominate two others, and the three might make the adjustment (*k*).

An act was passed in the 53d year of *George the Third* (*l*), continuing for seven years, the acts of the 48th and 49th already referred to, and another in the first and second years of the reign of *George the Fourth* (*m*), which recites, that it is expedient that the acts of the 49th and 53d Geo: 3 should be further continued, and then proceeds with enactments similar to those contained in them. These acts of the 53d Geo. 3 and 1st and 2d Geo. 4, supply a

(*k*) 48 Geo. 3, c. 130, s. 21 and 22;
49 Geo. 3, c. 122, s. 32, and 1 & 2 Geo.
4, c. 75, s. 37.

(*l*) 53 Geo. 3, c. 87.

(*m*) 1 & 2 Geo. 4, c. 75. See Appen-
dix.

deficiency in the former statutes, by enacting that goods of so perishable a nature, or so much injured or damaged that they cannot be kept, may, at the request of the persons interested or concerned in them, or in the saving and preserving of them, be sold with the consent of a justice of the peace⁽ⁿ⁾. They also authorize the passage of carts and carriages assisting in the preservation of wreck, over lands near to the part of the sea-coast where a vessel is wrecked, if there be no road equally convenient and expeditious; and also the placing on such lands of any parts of a wrecked vessel or goods saved for a reasonable time, making compensation to the occupier of the land, to be adjusted in the way directed by the act, and subjects to a penalty the owner or the occupier of the land interrupting or impeding such passage or placing^(o).

In order to assist the owners in the recovery of property no lord of the manor, or other person claiming to be entitled to wreck or goods, shall appropriate or dispose of the same until he shall have caused to be given in writing to the deputy vice admiral of that part of the coast, or to his agents, if they reside within fifty miles, if not, then to the corporation of the Trinity House, a report, containing an accurate and particular description of the wreck or goods found, and of the place where and time when found, and of any marks thereon, and of such other particulars as may the better enable the owner to recover them, and also the place where they are deposited, and may be found and examined by any person claiming any right to them, nor until the expiration of one whole year and a day after the delivery of such notice: The deputy vice admiral or his agent are, within forty-eight hours after receiving such report, to transmit a copy thereof to the secretary of the corporation of the Trinity House, upon pain of forfeiting for any neglect to transmit such account 50*l.* to any person who shall sue for the same, and the secretary is to cause such account to be placed in some conspicuous situation for the inspection of all persons claiming to inspect and examine it^(p).

Questions of salvage performed between high and low water mark are to be deemed to be within the jurisdiction of the Court

(n) 53 Geo. 3, c. 87, s. 3, and 1 & 2 Geo. 4, c. 75, s. 27.

1 & 2 Geo. 4, c. 75, s. 29 and 30.

(o) 53 Geo. 3, c. 87, s. 4 and 5, and

(p) 53 Geo. 3, c. 87, s. 2, and 1 & 2 Geo. 4, c. 75, s. 26.

of Admiralty, or Courts at *Westminster* (g). A *foreign* vessel doing damage to a *British* vessel in any harbour, &c., may be arrested till the master or owner or consignee, or their agent, shall undertake to appear and be defendant in an action, and give security for the damage and costs to be recovered (r).

And by the last act, the owners, or on their refusal, the salvors, may in all cases sell so much of the property saved as will defray the salvage and such charges as shall be allowed by the Court of Admiralty or the Justices (s). And by a subsequent act the commissioners of the Customs are to allow a sale for this purpose duty free (t).

15. The regulations before mentioned are chiefly applicable to the case of ships actually stranded or in danger of being so, and from which the goods are taken out by the salvors; I propose, in the next place, to mention the regulations introduced with respect to minor services, and the preservation of things under different circumstances: confining myself however to such of them as are in some way connected with salvage, and referring the reader to the last of the two of the statutes on this subject, which will be found at large in the *Appendix*, for such as more properly belong to the criminal code.

In the first place then, all persons who shall take up any anchors, cables, or goods, that may have been left by any vessel within any harbour, river, or bay, or on any of the coasts, whether the same shall have been in distress or otherwise, are required to send a report in writing of the articles found, and the time and place of finding, to a deputy vice admiral or his agent at or near the port, to which they shall first bring the articles, within twenty-four hours after their arrival, or before they leave the place, if they leave it within that time; and deliver them at such place as the vice admiral of each county shall appoint for safe custody until the articles are claimed by the owner or his agent, and the salvage and charges are paid or secured (u); and the deputy vice admiral or his agent is to send the report, or a copy of it, to the secretary of the corporation of the Trinity House of *Deptford*, who is to place it in

(g) 53 Geo. 3, c. 87, s. 6, and 1 & 2 Geo. 4, c. 75, s. 31.

(r) 53 Geo. 3, c. 87, s. 7, and 1 & 2 Geo. 4, c. 75, s. 32.

(s) 1 & 2 Geo. 4, c. 75, s. 38. By this section, the Commissioners of Excise

were to allow such sale duty free, but this is repealed by the 6 Geo. 4, c. 105, s. 351.

(t) 6 Geo. 4, c. 107, s. 47.

(u) 49 Geo. 3, c. 122, s. 1, and 1 & 2 Geo. 4, c. 75, s. 1.

some conspicuous situation for public inspection. This report is to be transmitted within two days, if the articles are of the value of £20^l., but it need not be done until the articles deposited amount to that value (*v*). The deputy vice admiral, or his agent, may also seize such articles as have not been reported to him, and is required to keep and report them to the Trinity House in like manner; and if he seizes without previous information he is to have one-third of the value; if he seizes in pursuance of information the third is to be divided between him and the informer (*w*). If the articles are not claimed within a year and a day after the report transmitted, they are to be sold, and the money applied as directed by the act of Queen *Anne* (*x*), and in case they had been seized, the deputy vice admiral or his agent, and the informer (if any) are equally entitled to the salvage, which shall be allowed by the Court of Admiralty to the salvors in the case of unclaimed property (*y*). And in the case of disagreement as to the amount of salvage, or the value of the articles, they are to be adjusted by three justices residing near the place where the articles are deposited, or in case the justices differ, they may nominate a third person conversant in maritime affairs (*z*).

In like manner three justices, or their nominee, are authorized to decide on all claims made by pilots, boatmen and other persons, for services of any description, (except pilotage) to be rendered by them to any ship or vessel, as well for carrying off from the shore to such ship or vessel any anchors, cables, or other stores, from any port or ports of the coast of *England* and *Wales*, and *Berwick-upon-Tweed*, or for the saving and preserving any goods or merchandize, which may have been wrecked, stranded, or cast away from any ship or vessel, or for being instrumental in saving the life or lives of any person or persons on board the said ship or vessel; the master, owner or owners of such ship or vessel, or his, her, or their agent or agents, being present with such justices—and this whether the vessel shall at the time be in distress or not (*a*).

(*v*) 49 Geo. 3, c. 122, s. 2 & 3, and 1 & 2 Geo. 4, c. 75, s. 2.

(*w*) 49 Geo. 3, c. 122, s. 4 & 6, and 1 & 2 Geo. 4, c. 75, s. 3 & 5.

(*x*) 12 *Anne*, stat. 2, c. 18, s. 2, at the end.

(*y*) 49 Geo. 3, c. 122, s. 7, and 1 &

2 Geo. 4, c. 75, s. 6.

(*z*) 49 Geo. 3, c. 122, s. 5 & 8, and 1 & 2 Geo. 4, c. 75, s. 4 & 7. The former of these acts gives the power to two justices.

(*a*) 49 Geo. 3, c. 122, s. 9, and 1 & 2 Geo. 4, c. 75, s. 8.

Either party, however, may, within *ten* days after the award is made, declare his desire of obtaining the judgment of the Court of Admiralty respecting the salvage, and thereupon the person claiming the salvage must proceed within *thirty* days from the date of the award by taking out a monition; but the justices are in such cases to deliver the goods to the proprietors or their agent, upon their giving good security in double the amount of the value to be taken in the manner prescribed by the act (b).

If the master, mate, or crew of any vessel bound to parts beyond the seas, shall find and take on board the vessel, any anchor, cable, goods, or merchandize, or receive and take them on board from any other person, knowing the same to have been so found, the commander of the vessel must make an entry of the articles and the time and place of finding in his log-book, and at the first

(b) 49 Geo. 3, c. 122, s. 10, and 1 & 2 Geo. 4, c. 75, s. 9. The former of these two statutes limited the time of the declaration to forty-eight hours. § In cases of appeal from the award of magistrates and commissioners appointed under these acts, to allow salvage on the spot, the Court of Admiralty is reluctant to disturb the decision, unless it appear inconsistent with the established principles by which its own practice is regulated. (*The Vesta*, Thompson, 2 Hag. Ad. Rep. 189; *the Brothers*, Stewart, 2 Hag. Ad. Rep. 195.) But in one case, (*The Oscar*, Lofgren, 2 Hag. Ad. Rep. 257,) Sir Christopher Robinson reversed the award of magistrates in a case of salvage, and made the following observations:—"That statute, the 1 & 2 Geo. 4, c. 75, was intended to provide for the reduction of expenses, and to prevent delay in small cases; and, although under the general words of the 8th clause, it may be competent to the magistrates to proceed in cases of greater magnitude, it is manifest that the primary object of the act was to provide for small and occasional services only, such as those specified in the act; and the magistrates cannot proceed in cases of a higher description with the same prospect of benefit or advantage to the parties. In large cases, the interest will be likely to induce one

party or the other to be dissatisfied with the award, and to appeal to the High Court of Admiralty; there must then be the expense of two proceedings, which, as in this instance, will amount to nearly as much as the salvage. The owners must ordinarily, and except in cases of positive misconduct, defray these expenses, and it would therefore, be an improvement of the act, if they had the power of removing the case to the Court of Admiralty in the first instance. The magistrates may judge with advantage of local circumstances, and of the value of the loss or damage occasioned to the salvors in consequence of their exertion; but they are inadequate judges of the principles that ought to govern cases of value with reference to rules of general policy, or the consistent application of analogies drawn from other cases, which is so desirable to be observed, and more particularly they must be very ill qualified to apply a rate of proportion, as they have done in this and in a former case, by giving integral proportions of the value. The rates of simple proportion graduate at large intervals; while the estimate of services, labour, and enterprise, requires to be made as minutely as possible under an infinite variety of particulars, and may, therefore, be better done by the allowance of precise sums." §

possible opportunity transmit a copy of the entry to the Trinity-house, and on the return of the vessel to any port in *England* or *Wales*, or the town of *Berwick-upon-Tweed*, he must deliver the articles to a deputy vice admiral or his agent, who is to transmit a similar report as before-mentioned to the Trinity-house for public inspection; and if there is no claim within a year and a day after such report transmitted, the articles are to be sold and disposed of according to law with regard to unclaimed property (c).

16. The regulations already detailed do not, as has been before observed, apply to any thing happening within the jurisdiction of the *Cinque Ports* (d), but several statutes (e) have been passed for matters occurring within that jurisdiction, the last of which appears to embody the provisions of the preceding with some alterations and additions, and will therefore alone be particularly noticed in this place.

17. The Lord Warden of the *Cinque Ports* or the deputy warden, and lieutenant of *Dover Castle*, 9 Geo. 4, c. 37, for the time is to appoint three or more substantial persons in each of the *Cinque Ports*, two ancient towns and their members, to adjust and determine any difference relative to salvage, which may arise between the master of any vessel and the person or persons bringing cables and anchors ashore; and in case any vessel shall be either forced or cut from her cables and anchors by extremity of weather, or by any other accident whatever, and leave the same in any roadstead or other place within the jurisdiction, and the salvage cannot be adjusted between the persons concerned, then the same shall be determined by any *three* or more of the said persons so to be appointed as aforesaid, within the space of *twenty-four* hours after such difference shall be referred to them for their determination thereof (f).

The commissioners are authorized to decide on all claims made by any person whatsoever for services of any sort or description

(c) 49 Geo. 3, c. 122, s. 14, and 1 & 2 Geo. 4, c. 75, s. 13.

(d) The *Cinque Ports* are *Dover*, *Sandwich*, *Romney*, *Hastings*, and *Hythe*; and the two ancient towns are *Winchelsea* and *Rye*. The jurisdiction may, in general, be considered to extend from *Seaford*, along the coast of *Sussex* and *Kent* towards the *Thames*. The limits

are particularly defined in the 18th section of the stat. 1 & 2 Geo. 4, c. 76, which will be found at large in the Appendix.

(e) 3 Geo. 1, c. 13, s. 5; 26 Geo. 2, c. 19, s. 10; 48 Geo. 3, c. 130, and 1 & 2 Geo. 4, s. 76.

(f) 1 & 2 Geo. 4, c. 76, s. 1.

rendered to any vessel, as well for carrying out anchors, cables, or stores, from any place within the jurisdiction, as for conducting vessels from the *Downs*, and other bays and roadsteads on the coast of *Kent*, *Sussex*, and *Essex*, and from the island of *Thanet*, or from the sea, or any place, to *Ramsgate*, *Dover*, or any other place with the jurisdiction, or for the saving or preserving within the jurisdiction any goods or merchandizes, wrecked, stranded, or cast away from any vessel, the master or owners thereof, or their agent, being present at the place where the commissioners are sitting; and this whether the ship shall have been in distress or not (*h*). But no commissioner can act for any other port or place than that in which, or within a mile whereof, he is resident (*i*). And either party may within *eight days* after the award declare his desire of obtaining the judgment of some competent Court of Admiralty with respect to the salvage or compensation, in which case the party must forthwith declare whether he will proceed in the Admiralty of *England*, or in the Admiralty of the *Cinque Ports*, and must proceed within *twenty days* from the date of the award; and the commissioners are to permit the ship and cargo to depart on their voyage, or deliver the goods to their owners, taking bail in double the amount of the sum awarded (*j*). An appeal so made is to be deemed final (*k*).

Anchors, cables, and other ship's stores and materials, and merchandize and marine stores taken possession of by boatmen and others, within the jurisdiction, are to be delivered at *Ramsgate*, *Deal*, *Dover*, *Harwich*, *Brightlersea*, or *Wivenhoe*, or such other place of public deposit as shall be declared by the Lord Warden (*l*), and the officers of the Lord Warden may seize such articles either within or without the jurisdiction, and either at sea or on shore, if concealed or conveyed to any other than one of the places of public deposit, or attempted so to be (*m*). The Lord Warden of the *Cinque Ports*, the Lieutenant of *Dover Castle*, the Deputy Wardens and the Judge of the Court of Admiralty of the *Cinque Ports*, Two ancient towns, and the members thereof, for the time being, and any other officers specially appointed by the Lord Warden, may execute within the jurisdiction all matters

(*h*) 1 & 2 Geo. 4, c. 76, s. 2.

(*i*) Sect. 3.

(*j*) Sect. 4.

(*k*) Sect. 5.

(*l*) Sect. 7 and 8.

(*m*), Sect. 9 and 11.

contained in the act, in like manner as any magistrate, or any commissioner to be appointed by virtue of the act may do (n).

By this Act also all the means which may be applied by virtue of the before mentioned statute of Queen *Anne* in cases within that statute, for the conclusively adjusting and recovering of salvage, may be applied in the case of persons acting under the mere employment of the officers, mariners or owners of any ship in distress, and on payment or tender and refusal of the quantum to be paid, or security given for payment thereof to the satisfaction of the commissioners, who shall have adjusted, no officer of the customs or other person in possession, may any longer retain the possession on any claim to compensation (o), and the owners, or on their refusal, the salvors, may in all cases sell so much of the property saved as will defray the salvage, and such charges as shall be allowed by the High Court of Admiralty, or the Court of Admiralty of the *Cinque Ports*, or the commissioners (p). And it seems that in this case also the commissioners of the Customs are to allow the sale duty free (q).

I have been thus particular in arranging and detailing the provisions of these statutes, from a hope that a better knowledge of them may induce the masters of ships in distress to avail themselves of them; and not submit to the very heavy charges too frequently made for assistance on such occasions (r), or incur the expense of litigation in the Courts of Law.

18. I proceed in the next place to the consideration of salvage payable upon *recapture*.

I have in a former chapter (s) spoken of the subject of capture,

(n) 1 & 2 Geo. 4, c. 76, s. 16.

(o) Sect. 19. z

(p) 1 & 2 Geo. 4, c. 76, s. 20. The power of selling duty free, which was given by this act, also is repealed by the 6 Geo. 4, c. 105, s. 352.

(q) 6 Geo. 4, c. 107, s. 47.

(r) The French Ordinance, so often quoted, contains an apparently excellent set of regulations on this subject, liv. 4, tit. 9, *Des Naufrages*. All vessels, &c., driven on shore, whether belonging to subjects or foreigners, are taken into the King's protection; the officers of the Admiralty are the persons appointed to preserve and take charge of them, and pay the persons

who assist in the salvage, and who are to act under their orders. But there seems to be no proper mode of settling the charges of the officers themselves, no *custos custodum*; and this defect has probably occasioned the complaints which the commentator informs us have often been made against their conduct in many places. A year and a day is the period allowed for reclaiming property, after which it is to be sold for the benefit of the crown. But claims have, in fact, been allowed after that period, as Valin informs us.

(s) Ante, part I, chap. I, sect. 4.

and of the alteration of property thereby occasioned. With a view to the subject more immediately under consideration at present, it may be taken as a general proposition, liable only to one exception, which will be noticed hereafter, that the ships or goods of the subjects of this country taken at sea by an enemy, and afterwards retaken at any indefinite period of time, and whether before or after sentence of condemnation, are to be restored to their original proprietors upon payment of salvage to the recaptors. This, however, is the result of the peculiar enactments of the Legislature of this country; it is a new and peculiar law made by this country for itself, in favour of merchant property recaptured, introducing a policy not originally adopted by other countries, and differing from its own more ancient practice. By the ancient rule of law, where a ship was taken and carried *infra præsidia*, and especially after a sentence of condemnation, the ship became the property of the captor; and if retaken, the former owner had no *jus postliminii*; and this continued to be the general law of Europe down to a very late period (t).

With regard to the beneficial interest in the goods of an enemy taken at sea, it was anciently established that in the case of capture by ships in the pay of the King, the King should have *one-fourth*, the owners of the ships another *fourth*; and the other moiety be divided among the captors; the admiral taking, if present, the share of *two* men in each vessel; if absent, of *one* only; and in the case of capture by private ships not in the King's pay, the King should claim no part, but the captors take the whole, allowing, however, to the admiral as much as the share of *two* men (u). But these proportions were occasionally varied at the King's pleasure; and Sir *Matthew Hale* informs us, that in his time the admiral had the *third* of goods taken by private men of war as his fee, but in right of the King (v). The entire beneficial interest was first given to the captors whether belonging to the royal navy, or private ships of war, by a statute

(t) By Sir Wm. Scott, in the case of *L'Actif, Lorral*, 1 Edw. 185.

(u) *Black Book of the Admiralty*, (a) 19, 20; *Clerk's Praxis*, p. 163.

(v) *Hale's Treatise*, in three Parts, part 3, chap. 28; in *Hargrave's Law Tracts*, p. 247. Two of the Ordinances, passed in the time of the usurpation, men-

tion "the tenths of prizes customarily due to the Lord High Admiral," and direct the same to be laid out in medals, as a reward for eminent services. *Scobell's Acts*, A.D. 1648, c. 12, and 1649, c. 21. The distribution of prize is settled by those Ordinances, and by the Ordinances of 1650, c. 28 & 33.

passed in the reign of Queen *Anne* (w). This, statute, however, contains no regulation of salvage or other provision in the case of recapture. During the short war with *Spain* in the reign of *George the First*, no legislative provision was made on the subject of prize. Soon after the declaration of war against *Spain* in the *thirteenth* year of the reign of *George the Second*, and against *France* in the *seventeenth* and *twenty-ninth* years of the same reign, acts of parliament (x), were passed on this subject, by each of which the ships or goods of the King's subjects taken and retaken, were decreed to be restored to their original owner, and the rate of salvage was fixed at *one-eighth* in the case of recapture by the King's ships; but in the case of recapture by private ships, whether acting with or without commission, the rate was made to vary according to the length of time during which the vessel might have been in the possession of the enemy; if such possession had not exceeded *twenty-four* hours, the rate was fixed at *one-eighth*, if between *twenty-four* and *forty-eight* at *one-fifth*, if between *forty-eight* and *ninety-six* at *one-third*, if above *ninety-six* at *one-half*. And in all cases, if the vessel recaptured were set forth as a vessel of war, during its possession by the enemy, the rate of salvage was fixed at *one-half*. A provision similar to the last had been made by several ordinances in the time of the usurpation (y), which in all other cases settled the salvage at *one-eighth*. The variation of the rate of salvage according to the time of the enemy's possession, probably occasioned many disputes, and therefore in the statutes passed in the last reign the rate has been uniformly fixed. At the commencement of hostilities with *America* (z), and afterwards with the *French King* (a), it was fixed at *one-eighth*, as well in the case of private ships as of those belonging to the royal navy; except in the case of vessels set forth as ships of war, in which case, as in the former statutes, it was fixed at *one-half*. At the commencement of the war, in the year 1793, the legislature fixed the rate of salvage at *one-eighth* for the royal navy, and at *one-sixth* for private ships; and in case of recapture by the joint operation of his Majesty's

(w) 6 Anne, c. 13. See Dr. Robinson's note in the case of the *Der Mohr*, Helmer, 4 Rob. Ad. Rep. 315.

(x) 13 Geo. 2, c. 4. Recapture, sect. 18; 17 Geo. 2, c. 34; Recapture, sect.

20; 29 Geo. 2, c. 34; Recapture, sect. 24.

(y) Scobell's Acts, A.D. 1648, c. 12; 1649, c. 21, and 1650, c. 28 & 33.

(z) 16 Geo. 3, c. 5, s. 24.

(a) 19 Geo. 3, c. 67, s. 44.

ships, and private ships, authorized the Judge of the Court to order such salvage as he should deem fit and reasonable: but enacted that recaptured ships, set forth by the enemy as vessels of war, should wholly belong to the recaptors, and not be restored to the original owners (b). And by this last statute it is also provided, that if a ship be retaken before she has been carried into an enemy's port, it shall be lawful for her, if the recaptors consent thereto, to prosecute her voyage, and the recaptors need not proceed to adjudication till *six months*, or the return of the ship to the port from which she sailed; and by consent of the captors the cargo may be unloaded and disposed of, before adjudication: and if the vessel does not return directly to the port of her departure, on the recaptors have had no opportunity to proceed to adjudication within *six months*, on account of the absence of the vessel, the Court of Admiralty shall, at the instance of the recaptors decree restitution to the former owners, paying salvage, upon such evidence as shall appear reasonable, the expense of such proceedings not to exceed the sum of *fourteen pounds* (c). Similar provisions were made at the beginning of the last war; and the same rate of salvage is fixed for his Majesty's hired armed ships, as for the royal navy (d). A store-ship in the King's service, claiming salvage in the Court of Admiralty, is entitled to the same rate, and no higher than a ship of war (e).

A convoying ship may be entitled to this salvage, for the recapture of a vessel under its protection taken in that situation, and effectually possessed by the enemy (f).

A ship once set forth and employed as a privateer or vessel of war falls within the exception, and is not to be restored upon recapture, although at the time of the recapture it may be employed purely as a merchant ship, carrying a cargo, without any commission of war, or any arms except a few muskets for self-defence (g). But the mere act of putting men on board a captured ship, which was armed at the time, and employing her as a cruiser, without a commission of war, does not bring the ship within the exception, nor defeat the right of the original owner (h).

(b) 33 Geo. 3, c. 66, s. 42.

(c) Sect. 44.

(d) 43 Geo. 3, c. 160, s. 39 & 41; 45 Geo. 3, c. 72, s. 7; and 48 Geo. 3, c. 132.

(e) *Sedulous*, Mills, 1 Dods. Ad. Rep. 263.

(f) *The Wight*, Ford, 5 Rob. Ad. Rep. 215.

(g) *L'Actif*, Lorral, 1 Edw. 185.

(h) *The Horatio*, Nelson, 6 Rob. Ad. Rep. 320.

If a ship captured by the enemy be voluntarily abandoned by him at sea after taking out the crew, either because he may be unable, or may not think it worth while to carry her into port, and be found and taken possession of by a *British* ship of war, this is not a recapture within the act of Parliament, and the Court of Admiralty is not restricted as to the rate of salvage, but may apportion it to the nature and merits of the case (*i*).

A ship may be in the legal and constructive possession of the enemy, though not, at the moment in his actual possession; and this will be sufficient to found a claim for salvage under the act of Parliament. This was held in the case of a *Portuguese* ship, which being on a voyage from *Pernambuco* to *Liverpool*, with a cargo belonging to *British* and *Portuguese* merchants, put into the port of *Muros* in *Spain*, in consequence of having sustained damage at sea, and was in that port at the time when the *French* took possession of the place. The *French* withdrew to proceed on another expedition; but they were near at hand, and had it in their power to return whenever they might think proper, and were not unlikely to do so. The principal persons of the place were in their interest, and it was not probable they would willingly have suffered such a ship and cargo destined for *England* to come away without molestation. In this state of things, the ship was brought out of the port by the boats of a *British* frigate, when there were only four persons on board. The cause being in the Prize Court of Admiralty, the learned judge made a decree for the rate of salvage under the statute; observing, there was no doubt that the property had been rescued from considerable peril by the captain of the frigate, and that he was entitled to a remuneration of some kind or other, so that the only question was, whether this should be considered as a case of *military* salvage, or the parties be put to the expense of a fresh suit in the Instance Court (*j*).

A *British* army acting in a foreign country, in conjunction with a native force, without the co-operation of a fleet, and liberating a port of the country from the hands of their common enemy, by operations on land, directed to that end near to and in the place, may be entitled to salvage under the statute on *British* ships found in the port, and on their cargoes, whether actually on board

(*i*) *The Gage*, Mitchell, 6 Rob. Ad. Rep. 273; *the Lambton*, id. 275, note, and *the Lord Nelson*, 1 Edw. 79.

(*j*) *The Pensamento Felix*, Megal. haens, 1 Edw. 115.

at the time or landed and warehoused, thus rescued from the enemy; but not on the property of the natives of the country thus delivered, and which reverts to their possession and dominion. And if, in such a case, the masters of the *British* ships are allowed to bring their cargoes to *England*, under their own management, according to their original intention, the salvage is to be estimated upon the value in *England* (*k*).

The right to participate in the salvage in the case of alleged joint capture, depends so much upon the circumstances of the particular case, the character of the vessels on behalf of which the claim is preferred, and the nature of the assistance on which it is founded, that no general principle of practical utility can be extracted from the decisions (*l*).

19. It may be proper to mention in this place the practice of the Court of Admiralty in the case of the property of the allies of this country, taken at sea by a common enemy, and retaken by the subjects of this country. For this purpose I cannot do better than use the words of the learned judge who now presides in that Court. "The maritime law of *England*," says Sir *William Scott*, "having adopted a most liberal rule of restitution on salvage, with respect to the recaptured property of its own subjects, gives the benefit of that rule to its allies, till it appears that they act towards *British* property on a less liberal principle: in such a case it adopts their rule, and treats them according to their own measure of justice" (*m*). In conformity to this rule, the *San Jago* was not restored to the king of *Spain*, because retaken from his then enemy the *French*, under circumstances in which the *Spanish* courts had condemned *British* property retaken by the *Spaniards*; and shortly afterwards, two *Portuguese* ships were for the same reason condemned, and several others at the same time restored (*n*), because, in the interval between the different captures, an Ordinance of the Court of *Portugal* had altered the rule of restitution in that country; and they were restored upon payment of the

(*k*) *The Progress*, Barker, 1 Edw. 210. The case arose out of the recapture of Oporto. The reader will find much instruction from the perusal of the very learned judgment delivered in the cause.

(*l*) *Bellona*, 1 Edw. Ad. Rep. 63; *Wanstead*, ib. 268; *Lo Niemen*, 1 Dods.

Ad. Rep. 16; *La Belle Coquette*, id. 20; *Union*, id. 346; the *Sparkler*, id. 359.

(*m*) In the case of the *Santa Cruz*, 1 Rob. Ad. Rep. 63. The whole is a most finished model of judicial eloquence.

(*n*) Same case.

rate of salvage established in *Portugal*; viz. *one-eighth* to king's ships, and *one-fifth* to privateers. Upon the same principle, a *British* ship, which had been taken by the *French*, and carried into *Ponteredra* in *Spain*, and condemned by the Prize Court at *Paris*, being afterwards seized as *French* property, and sold under the orders of the Junta of *Gallicia*, then enemies of *France*, and allies of this country, and which came to *England* and was claimed by the original *British* owner, was not restored (*o*). At a later period, a *Spanish* ship was restored on payment of *one-eighth*, upon the ground of an article in a recent treaty between *Spain* and this country, providing for mutual restitution on salvage (*p*). Of this principle of *British* jurisprudence, whatever attempts may be made to shake it from motives of public policy or private interest, reason must now declare, and posterity will hereafter confess, that it is founded on the immoveable basis of reciprocal justice. The right of recaptors to salvage is extinguished by a subsequent act of capture and condemnation by an enemy, but it must be a regular sentence of condemnation carried into execution; for if the sentence of the Prize Court be overruled by an order of release from the sovereign power of the state, the recaptors are not deprived of their right to salvage (*q*).

If the property of a nation not engaged in hostility with the enemies of this country, happen to be taken as prize by them, and retaken out of their hands by his Majesty's subjects, the probability of its condemnation in the Courts of the country of the captors is to be considered; and unless there appear to be ground on which it may be supposed that it would have been condemned in those Courts, it is to be restored *without the payment of any salvage*. Upon this ground an *American* ship, carrying provisions and naval stores on the part of the *American* government, for the use of their fleet in the *Mediterranean*, was restored without any salvage on recapture from the *Spaniards* (*r*). So an *American* ship which had been seized by the *French Douaniers* in the river-*Yadhe*, and released upon giving bail, by depositing a sum of money to answer the sentence of a Court of Prize, and which was brought out of the river by the boats of an *English*

(*o*) The *Victoria*, 1 Edw. 97.

(*p*) San Francisco, Da Paula, 1 Edw. 279.

(*q*) Charlotte Caroline, Ader. 1 Dods.

Ad. Rep. 192.

(*r*) The *Huntress*, Stinson, 6 Rob. Ad. Rep. 104.

gun-brig, was restored without salvage; for it was considered that the ship would have been free by reason of the security and deposit, even if sentence of condemnation should pass (*s*). In the war preceding the last, the conduct of the cruisers and Prize Courts of *France*, having given reason to apprehend that neutral property arrested by the former on the high seas, would in almost all cases be condemned by the latter, salvage was usually allowed to recaptors of neutral property out of the hands of the *French* by our Court of Admiralty, and such allowance was not thought unreasonable by the neutral merchants; but this was treated as an exception to the general rule, founded on particular circumstances (*t*). And in the last war it was allowed upon the capture of *American* ships from the *French* and *Danes*, which were navigated without the certificates of origin required by the *French* decrees, and of which the condemnation was to be expected from the usual practice of *France* and *Denmark* on similar occasions (*u*).

20. By the 6 Geo. 4, c. 49, it is enacted, That if any ship, merchandize, or other property found and taken in the possession of pirates, shall be duly proved in and adjudged by the Court of Admiralty, or other Court having competent jurisdiction therein, to have belonged to, and to have been taken from any of his Majesty's subjects, then such ship, merchandize and other property, and every part thereof so proved, shall by the decree of the said Court be adjudged to be restored, and shall be accordingly restored to the former owner or owners, proprietor or proprietors' thereof respectively, he or they paying for, or in lieu of salvage, a sum of money equal to one-eighth part of the true value of such ship, merchandize and other property respectively; which money shall be paid to and divided, and distributed amongst such persons, and in such manner, form and proportion, as shall by any proclamation, or order of his Majesty in council, be directed for the distribution of the produce of any ship, vessel, boat, goods or other property of pirates (*v*).

(*s*) *The Robert Hall*, Randall, 1 Edw. 265.

(*t*) *The Carlotta*, Pasquel, 5 Rob. Ad. Rep. 54; *the Eleonora Catharina*, Kneagh, 4 Rob. Ad. Rep. 156; *Fanny*, Lawton, 1 Dods. Ad. Rep. 443. This

last was the case of neutral goods shipped in an armed British vessel, which was taken and retaken.

(*u*) *The Acteon*, Mason, 1 Edw. 254.

(*v*) Sect. 3.

CHAPTER XII.

OF THE DISSOLUTION OF CONTRACTS FOR THE CARRIAGE OF
GOODS IN MERCHANT SHIPS.

1. HAVING thus considered the several species of contract made for the carriage of goods in merchant ships, and the various duties arising therefrom, I proceed in the last place to the examination of the modes by which contracts of this nature may be dissolved. And these are, either the voluntary act of the contracting parties, or some extrinsic matter happening after the making of the contract and before its completion.

2. It is a general rule that whatever derives its force and validity from the consent of parties, may by the mutual consent of the same parties be rendered null and invalid. There is indeed a technical rule of the law of *England*, which requires the discharge of a person from a contract to be made by an instrument of as high a nature as the original instrument of contract: and this rule is applicable to the contract of affreightment by charter-party under seal; but in case of a discharge by mutual consent not expressed in this formal manner, the rule would at the utmost have no other effect than to render it necessary for the party to apply to a Court of Equity. In all such cases, however, prudence requires that the deed should be cancelled and delivered up.

But a merchant, who has laden goods, cannot insist upon having them relanded and delivered to him without paying the freight that might become due for the carriage of them, and indemnifying the master against the consequences of any bill of lading signed by him (a). Indeed a master who has signed bills of lading cannot with prudence deliver back the goods without having all the parts of the bill of lading delivered up to him, for if any one part

(a) 2 Eq. Ca. Ab. p. 98, Anon.

has been transmitted to a third person, such third person may have acquired an interest in the goods.

3. Another general rule of law furnishes a dissolution of these contracts by matter extrinsic. If an agreement be made to do an act lawful at the time of such agreement, but afterwards, and before the performance of the act, the performance be rendered unlawful by the government of the country, the agreement is absolutely dissolved. If, therefore, before the commencement of a voyage, war or hostilities should take place between the state to which the ship or cargo belongs, and that to which they are destined, or commerce between them be wholly prohibited, the contract for conveyance is at an end (*b*), the merchant must unlade his goods, and the owners find another employment for their ship. And probably the same principles would apply to the same events happening after the commencement and before the completion of the voyage, although a different rule is laid down in this case by the *French Ordinance* (*c*), as I have before observed. But if war or hostilities break out between the place, to which the ship or cargo belongs, and any other nation, to which they are not destined; although the performance of the contract is thereby rendered more hazardous, yet is not the contract itself dissolved, and each of the parties must submit to the extraordinary peril, unless they mutually agree to abandon the adventure.

So, if the government of the country, to which the ship and cargo belong, should prohibit the exportation of the particular commodities that compose the cargo, or by the terms of the contract are destined to compose it, (as is sometimes done by all states with regard to provisions in a time of scarcity), in this case also it seems that the law of the country would give no damages to the owner against the merchant, who had been thus compelled by the law of the same country to abandon his engagement (*d*), but the contract would be dissolved on both sides. On the other hand, if a merchant hire a ship to go to a foreign port, and covenant to furnish a lading there, a prohibition by the government of that country to export the intended articles, neither dissolves

(*b*) French Ordin. liv. 3, tit. 1, des Charte-parties, art. 7; Code de Com. art. 276.

(*c*) Liv. 3, tit. 3; Fret. art. 15. See

before, part 4, chap. 8, sect. 5, and the Code de Com. art. 299.

(*d*) By Lord Ellenborough, in *Barker v. Hodgson*, 3 M. & S. 267.

the contract, nor excuses a non-performance of it (e); for the laws of one nation do not give effect to the positive institutions of another inconsistent with its own; and the different interests of nations sometimes render an act meritorious in one, which is prohibited by another in alliance with it, if the act be not contrary to the general law of nations, or to existing treaties; and the common exception of the restraint of princes and rulers applies only to the case of the master (f). But in such a case, or if the default be owing to the personal neglect or inability of the freighter, and not to any general cause, the master, upon his arrival at the port of lading, should obtain another cargo, if possible, from other persons, and not sullenly hoist sail and depart, in order to charge the merchant with the whole freight. And if upon the ship's arrival he is informed that the merchant is unable to furnish the lading, he cannot, by waiting the time appointed in the charter-party, charge the merchant with the demurrage (g). It has also been held, that a contract was not dissolved, nor a merchant excused for the non-performance of his covenant, by a prohibition of intercourse on account of an infectious disease (h).

4. But although contracts of this nature are dissolved by the breaking out of war or hostilities in the manner before mentioned, of which no person can foresee the termination; yet they are not dissolved by an embargo, or temporary restraint of their performance imposed by the government of the country in whose ports the vessel may happen to be, as a measure of political caution in time of war, or upon the expectation of it, either in the lading port, or in a place at which the ship may have touched in the course of her voyage (i). This subject has received a judicial determination in the law of *England*. The case (k) was as follows: *Hadley*, the plaintiff, brought an action against *Clarke & others*, owners of the ship *Pomona*, for not carrying to *Leghorn* goods put on board the *Pomona* at *Liverpool*, to be conveyed to *Leghorn*, the danger of the seas only excepted. The plaintiff had paid 297l. 18s. for

(e) *Blight and Others v. Page*, Guildhall Sit. after Mich. Term, 1801, before Lord Kenyon, Ch. J., cited 3 Bos. & Pull. 295, note (a), and see *Sjoerds v. Luscombe*, 16 East, 201.

(f) *Blight and Others v. Page*, and see also as to this point, *Touteng and Another v. Hubbard*, 3 Bos. & Pull. 298.

(g) *Blight and Others v. Page*.

(h) *Barker v. Hodgson*, 3 M. & S. 267.

(i) French Ordin. liv. 3, tit. 1; Des Chartes-parties, art. 8, and see liv. 3, tit. 3; Fret. art. 16; Pothier, Chartes-parties, num. 100.

(k) *Hadley v. Clarke*, 8 Term Rep. K. B. 259.

insurance of the goods for the voyage. The ship sailed from *Liverpool*, and in pursuance of permission given for that purpose, put into *Falmouth* on the 30th of *June*, 1796, to wait for convoy. While she waited there for that purpose, an embargo was by order of the King in council, dated 27th of *July*, 1796, laid on all ships bound to *Leghorn*, being one of the ports in the territories of the Grand Duke of *Tuscany*, then in the possession of the *French*. This embargo was directed to continue until further order of the board of Privy Council. On the 23rd of *August* following another order of Council issued, allowing vessels in the situation of the *Pomona* to return to their ports of lading, and land and warehouse their cargoes there under certain regulations. In the month of *August*, 1798, and not before, the *Pomona* left *Falmouth* without the consent of the plaintiff, and returned to *Liverpool*, where after some dispute the plaintiff received the goods without prejudice to the question, whether under the circumstances the defendants were excused for the non-performance of their contract. On the 24th of *October*, 1798, the embargo was taken off. At the trial of the cause the plaintiff obtained the verdict of a jury for the amount of the charges of insurance. The right of the plaintiff to recover was afterwards solemnly discussed in the Court of King's Bench; and the Court was of opinion that the embargo did not dissolve the contract, being only a temporary restraint, and that the plaintiff had a right to recover. Before the commencement of the transaction between the parties, all intercourse with countries under the government of the *French*, during the then existence of hostilities between *France* and this country, had been prohibited by act of Parliament (1); but this prohibition was also held to be only temporary with respect to *Leghorn*, and consequently not to alter the case.

In the case of an embargo, the *French* Ordinance expressly authorizes the merchant to unlade the goods at his own expense, if he thinks fit, upon condition to relade them or indemnify the master (m); and *Valin* (n) and *Pothier* (o) declare it to be their opinion, that if the goods are of such a sort that they will not keep during the period of the embargo, and cannot at its expiration be readily replaced by others of the like kind, the embargo will put

(1) 33 Geo. 3, c. 27, sect. 3.

(n) Tom. 1, p. 628.

(m) Liv. 3, tit. 1, Charte-parties,
art. 9.

(o) Charte-partie, num. 102.

an end to the contract. In such a case, whatever the rule of law may be, the interest of all parties will in general induce them to annul the contract upon reasonable terms.

But in the case of an embargo imposed by the government of the country, of which the merchant is a subject, *in the nature of reprisals and partial hostility* against the country to which the ship belongs, the merchant may put an end to the contract, if the object of the voyage is likely to be defeated by the delay. Thus in the case of a *Swedish* ship, chartered by a *British* merchant to go from *London* to *St. Michael's* for a cargo of fruit, which having sailed on the voyage was driven back by contrary winds and forced into *Ramsgate* harbour, and there stopped on the 15th of *January*, 1801, by the embargo, imposed by the *British* government on all *Swedish* vessels; upon which the merchant applied to the captain to give back his letters of advice, who declined to do so, and who soon after the embargo was taken off, which happened in the following *June*, offered to proceed on the voyage, but was directed by the merchant not to do so, because the season for shipping fruit was then passed: the Court of Common Pleas held that the master could not maintain an action against the merchant for the non-performance of the contract (*p*). For otherwise a *British* subject would sustain the evils that the government of his country intended to inflict on *foreigners*; which is contrary to the principle now established in the law of insurance, *vis.*, that the insurer is not answerable for a loss happening to an *enemy* by *British* capture in a course of hostilities, whether existing at the time of insurance, or taking place afterwards (*q*).

In the case of another *Swedish* vessel stopped under the same embargo, with a *British* cargo of fish on board, the cargo was taken out and restored; and upon the restoration of the ship the learned Judge of the Court of Admiralty held the merchant not to be liable to the freight, as I have mentioned before (*r*).

5. § The effect upon subsisting contracts of blockade of the port of departure does not appear to have been directly decided in our Courts, but after much discussion in the Courts of *America*,

(*p*) *Touteng and Another v. Hubbard*, 3 Bos. & Pull. 291.

(*q*) *Furtado v. Rodgers*, 3 Bos. & Pull. 191; and *Kellner v. Le Mesurier*; *Gamba v. Mesurier*, and *Brandon v. Cur-*

ling all three decided in the Court of King's Bench in Mich. Term, 1803, and reported, 4 East, 396, 407, 410.

(*r*) *The Isabella Jacobina*, *Sovergren*, 4 Rob. Ad. Rep. 77.

it has been considered, on the principles established in the cases above cited, not to dissolve a contract of affreightment, but merely to operate as a temporary suspension of its performance.

"This," says Chancellor *Kent* (*s*), "was the decision in the case of *Palmer v. Lorillard* (*t*), by the Court of Errors, of New York, in which the doctrine was extensively examined; and it was shown by a reference to the foreign ordinances and the soundest classical writers on maritime law (*u*), that the master, in the case of such an invincible obstacle of a temporary nature to the prosecution of the voyage, is entitled to wait for the removal of it, so that he may earn his freight, unless the cargo consists of perishable articles which cannot endure the delay. He stands upon a principle of equity which pervades the maritime law of *Europe*, if he refuses to surrender the cargo to the shipper without some equitable allowance in the shape of freight for his intermediate service."

Mr. Justice *Story*, however, says, that the question whether the master is entitled to retain the cargo until a compensation in lieu of freight be made to him, or be left to his remedy against the merchant by an action on the case, is still open to discussion.

6. When a blockade has been publicly notified to the government of a country, parties in that country entering into contracts after such notification, must be taken to have knowledge of its existence (*v*), and although such a notification does not, *proprio vigore*, bind the subjects of any state but that to which it is addressed, yet in a reasonable time it will affect neighbouring states with knowledge as a reasonable ground of evidence (*w*). Accordingly, where a vessel belonging to *Bremen* was captured on her voyage outward from *Amsterdam*, then in a state of blockade, and it was pleaded in her behalf that the blockade existed *de facto* only, and that no notification of it had been made to the *Hanse Towns*, Lord *Stowell* condemned the ship, and said, "At *Amsterdam* it must have been a subject of general notoriety that the port was legally considered, by the *English*, in a state of blockade;

(*s*) Commentaries, Edinburgh Edition, p. 216.

(*t*) 16 Johns. Rep. 348.

(*u*) Ordin. de la Mar. liv. 3, tit. 3; Fret. art. 15, and Charte-partie, art. 8; Valin, p. 1; Pothier, Charte-partie, num. 69, 100, 101; Laws of Oleron, art. 4; Consolat. par Boucher, chap. 80, 82,

84; Roccus, de Nav. p. 54; Jacobson's Sea Laws, by Freck.

(*v*) *Medeiros v. Hill*, 8 Bing. Rep. 231. *Naylor v. Taylor*, 9 B. & C. 718.

(*w*) *The Adelaide*, 2 Rob. Ad. Rep. 111; *the Tutela*, Reinbrock, 6 Rob. Ad. Rep. 177.

and it is impossible that it should not have come to the knowledge of this *Bremen* man. It is not to be said by any person, 'although I know a blockade exists, yet because it has not been notified to my Court I will take out a cargo.' If it was known to every *Dane* and *Swede*, it is impossible that it should not be known to this man. It is not more likely to have been unknown to this vessel, from the circumstance of its being a *Bremen* ship, when we consider the particular relation which *Bremen* bears to the sovereign of this country."

7. With respect to blockade of the port of destination, it has been decided by the Supreme Court of New York, that it operated a complete dissolution of the contract (*x*). That decision proceeded on the broad ground, that what has become unlawful by the general law of nations, cannot be lawfully done by the subjects of any particular state. The question does not appear to have directly arisen in our courts of common law, but the general principle has been acted upon by Lord *Stowell* (*y*) and was assumed by the Courts of King's Bench and Common Pleas in the cases which will be presently cited.

But to produce this effect it must be a real and effective—not a nominal or relaxed blockade (*z*).

"A blockade," said Lord *Stowell*, "may be more or less rigorous, either for the single purpose of watching the military operations of the enemy and preventing the egress of their fleet, as at *Cadiz*, or on a more extended scale, to cut off all access of neutral vessels to that interdicted place, which is strictly and properly a blockade, for the other is in truth no blockade at all, as far as neutrals are concerned. It is an undoubted right of belligerents to impose such a blockade, though a severe right, and as such not to be extended by construction. It may operate as a grievance upon neutrals, but it is one to which by the law of nations they are bound to submit. Being, however, a right of a severe nature, it is not to be aggravated by mere construction. If the ships stationed on the spot to keep up the blockade will not use their force for the purpose, it is impossible for a court of justice to say there was a blockade actually existing at the time so as to bind the vessel" (*a*).

(*x*) *Scott v. Lubby*, 2 Johns. Rep. 336.

(*y*) *The Tutela*, 6 Rob. Ad. Rep. 177.

(*z*) *The Neptunus*, 2 Rob. Ad. Rep. 110.

(*a*) *The Juffrow Maria*, *Schroeder*, 3

Rob. Ad. Rep. 147.

8. There must also, to render the voyage illegal, be a premeditated intention to break the blockade. If it be part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country, a vessel may lawfully clear out for a blockaded port (*b*). And unless there were such a premeditated intention to violate the blockade, it is no defence to an action on a charter-party for not sailing on the voyage towards the port agreed on, that the port was in a state of blockade, if the defendant knew the fact at the time of entering into the charter-party.

In the recent case of *Medeiros v. Hill*, (*c*) which was an action of assumpsit against a shipowner for not proceeding to *Terceira* pursuant to charter-party, the defence was, *first*, that at the time the charter-party was entered into, *Terceira* was in a state of blockade by the government of *Portugal*, which blockade had been notified to the English government, and consequently that the voyage was an illegal voyage; and, *secondly*, that although the voyage might not be, strictly speaking, illegal, the circumstances of the blockade operated as an excuse for the non-performance of the contract.

Upon these points, Chief Justice *Tindal*, delivering the judgment of the Court of Common Pleas, observed, "The case of the *Neptunus* (*d*) which was cited in support of the first objection, establishes that it is illegal to attempt to enter a blockaded port in violation of the blockade, and that after notification of the blockade, the act of sailing to a blockaded port with the intention of violating the blockade, is in itself illegal. But neither that case nor any other that can be cited has laid it down that the mere act of sailing to a port which is blockaded at the time the voyage is commenced, is any offence against the law of nations, where there is no premeditated intention of breaking the blockade, if it shall be found to continue in force when the ship arrives at the port. Any such determination would be destructive, in many instances, of the fair commercial speculations of neutral merchants, to whom it might be of the first importance to possess the opportunity of introducing their goods into the port which had been blockaded, at the very earliest moment after such blockade had been

(*b*) *The Shepherdess*, 5 Rob. Ad. Rep. 262; the *Neptunus*, 2 Rob. Ad. Rep. 110; *Naylor v. Taylor*, 9 B. & C. 719.

(*c*) 8 Bing. Rep. 231.
(*d*) 2 Rob. Ad. Rep. 110.

relaxed. In the present case there was no evidence of any understanding between the contracting parties that the defendant was to break the blockade of *Terceira*, in order to deliver his outward cargo. Indeed, the fact of the blockade did not appear to enter into the contemplation of either party until after the defendant's son, the captain of the vessel, had signed the charter-party for his father; and, upon the evidence, the blockade had ceased to be a real and effective blockade long before the charter-party was entered into.

"We see, therefore, no reason for holding the contract to be void on the ground of illegality."

"As to the second point, it is sufficient to say, that as the blockade had been publicly notified to the government of *England*, the contracting parties must be taken to have entered in the charter-party with an equal knowledge of its existence; no difficulty, therefore, attending the performance of the contract can be set up as an excuse for its non-performance. In that case, the rule of the law laid down in *Paradise v. Jane* (*f*) applies, viz: "That where a party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by the contract."

This judgment is in conformity with the opinion delivered by Lord *Stowell* in the case of an *American* ship, (*g*) condemned by him for an attempted breach of the blockade of *Havre*. Adverting to that opinion, Lord *Tenterden*, in the case of *Naylor v. Taylor*, an action on a policy of insurance, expressed himself as follows: "We think there is no ground for saying that this voyage as insured was illegal in its commencement; indeed, according to the opinion of Lord *Stowell*, in the case of the *Shepherdess*, the vessel might have sailed to *Buenos Ayres*, without contravening the laws of nations, provided it was a part of the original intention to inquire as to the continuance of the blockade at some port of the blockading country; and in this case inquiry might have been made at *Monte Video* or of any of the *Brasilian* ships met in the river *Plate*, and the policy is framed upon a doubt whether the blockade would continue at the time of the ship's arrival at the *Plate* and does not indicate any intention to break the blockade (*h*)."

(*f*) *Alley's Rep.* 27.

Rep. 262.

(*g*) *The Shepherdess*, 5 *Rob. Ad.*

(*h*) *Naylor v. Taylor*, 9 *B. & C.* 719.

PART V.

OF THE WAGES OF MERCHANT SEAMEN.

CHAPTER I.

OF THE HIRING OF SEAMEN.

SEAMEN employed in merchant ships are usually hired at a certain sum, either by the month or for the voyage. In the former case the amount of the payment that may be earned by them, depends upon the length of the voyage; in the latter it is fixed invariably without any regard to the duration of the voyage. In the fishing trade, particularly the whale-fishery, and in private ships of war, the seamen usually serve under an engagement to receive a certain portion of the profits of the adventure. Such an engagement is *rather in the nature of a partnership* than of a contract of hiring and service, and the objects of it do not properly fall under my consideration. An engagement to receive a certain part of the freight, to be earned by a merchant ship, which seems formerly to have been not unfrequent, is at present seldom, if ever made.

This last part, therefore, of the present treatise will be employed in the consideration of contracts made for the employment of seamen by the month or for the voyage; of the earning and payment of wages in pursuance of such contracts; of the loss and forfeiture of wages; and of the modes of enforcing payment by the aid of Courts of Justice. Each of these topics will form the subject of a distinct chapter.

And FIRST, as to the *hiring* of seamen.

1. In order to prevent the mischiefs that frequently arose from the want of proper proof of the precise terms, upon which seamen engaged to perform their service in merchant ships, it was enacted by a statute made in the early part of the reign of King *George the Second*, "That it should not be lawful for any master or com-

mander of any ship or vessel, bound to parts beyond the seas, to carry any seaman or mariner except his apprentice or apprentices, to sea from any port or place where he or they were entered or shipt, to proceed on any voyage to parts beyond the sea, without first coming to an agreement or contract with such seamen or mariners for their wages; which agreement or agreements should be made in writing, declaring what *wages* each seaman or mariner was to have respectively during the whole voyage, or for so long time as he or they should ship themselves for; and also to express in the said agreement or contract, *the voyage* for which such seaman or mariner was shipt to perform the same;" under a penalty of 5*l.* for each mariner carried to sea without such an agreement, to be forfeited by the master to the use of Greenwich Hospital (*a*). This agreement was to be signed by each mariner within three days after he should have entered himself on board the ship; and was, when signed, conclusive and binding upon all parties (*b*), but did not apply to a *British* seaman entering on board a *Foreign* ship, in a *British* port (*c*). A subsequent statute extended these provisions to all his Majesty's colonies in *America* (*d*). The statute required the agreement to be signed only, and did not require it to be sealed. And at the trial of an action *upon the case* brought by a mariner for his wages against the master, (a form not applicable by the law of *England* to a contract *by deed*) at which it appeared that seals were affixed to the names of the plaintiff and other mariners, at the foot of the articles, which in other respects were in the usual form: the learned Judge who tried the cause, held the form of action proper notwithstanding the seal (*e*). A seal alone does not constitute a deed in the technical language of our law; *delivery* as a deed is essential to this purpose; but it did not appear that this instrument either had been, or was intended to be, so delivered.

By another statute a similar agreement in writing was required to be signed by the master and mariners of vessels of the burthen of one hundred tons or upwards, employed in the *coasting trade* from any port or place in *Great Britain*, to any other

(*a*) 2 Geo. 2, c. 36, s. 1, made perpetual by 2 Geo. 3, c. 31. A similar agreement is required by an act of Congress of the United States of America, 1790, c. 29, s. 1.

(*b*) 2 Geo. 2, c. 36, s. 2.

(*c*) *Dickman v. Benson*, 3 Camp. 290.

(*d*) 2 Geo. 3, c. 31, s. 2.

(*e*) *Clement v. Gunhouse*, at Guildhall, before Chambre, J., 5 Esp. N. P. C. 83.

port or place in *Great Britain*, and going to *open sea* (f): but by the terms of that statute, the contract was to specify for *what time or for what voyage or voyages* the mariner should contract.

The statute required the voyage to be mentioned, and it was held, this ought to be done with as much precision as could conveniently be introduced, and so as to give the mariner due notice of the adventure on which he embarked. In the case of a ship bound to *New South Wales*, where the voyage was expressed to be to *New South Wales and India or elsewhere*, and to return to a port in *Europe*, Lord Stowell thought the words, *or elsewhere*, ought not to be taken in the indefinite latitude in which they were expressed, but must receive a reasonable construction, conformable to a certain extent to the necessities of commerce, and would not authorize the master to proceed, as in fact he had done, from *Port Jackson* to *New Zealand* in search of a cargo; from thence to *Valparaiso*, and *Lima*, and *Otaheite*, and back to *Sydney Cove*, and from thence to *Calcutta* (g). And in another case, where the voyage was expressed to be from *London* to *Batavia* to any ports and places, the *East India* seas, or elsewhere, and until her final arrival at any port or ports in *Europe*, it appearing to have been the intention of the owners at the commencement of the voyage, that the ship should return from *India* to *Cowes*, and there receive orders as to the port of discharge; the same learned Judge considered the description of the voyage much too general to answer the beneficial purposes intended by the statute requiring the voyage to be mentioned in the contract, and thought the intention to come to *Cowes* for orders, as to the port of delivery ought to have been mentioned (h).

2. With regard to ships trading to the *West Indies*, it was enacted, that after the *first* day of *July* 1797, every seaman who should desert at any time during the voyage either out or home from any *British* merchant ship trading to or from his Majesty's colonies and plantations in the *West Indies*, should, over and above all punishments, penalties, and forfeitures, to which he was before by law subject, forfeit all the wages he might have agreed

(f) 31 Geo. 3, c. 39, s. 1, 2, and 10.
(g) *The Minerva*, Bell, 1 Hag. Ad. Rep. 374.

(h) *The George Home*, Young. See

also *Eliza*, Ireland, 1 Hag. Ad. Rep. 182; and *Countess of Harcourt*, Bunn. id. p. 248.

for, with, or be entitled to during the voyage, from the master or owner of the ship, on board of which he should enter immediately after such desertion (i).

And by the same statute it was enacted, "That all and every master or commander of *any British* merchant ship, who shall from and after the first day of *July* 1797, hire or engage to serve on board his ship or vessel, any seaman, mariner, or other person, who should, to the knowledge of such master, have deserted from any other ship or vessel, should forfeit and pay the sum of *one hundred* pounds (j), and that no master or commander of any merchant ship or vessel, which should, from and after the first day of *July*, 1797, sail or proceed from any port or place in *Great Britain*, should hire or engage, or cause or procure to be hired or engaged, any seaman, mariner, or other person, at any port or place within his Majesty's colonies or plantations in the *West Indies*, to serve on board any such merchant ship or vessel, at or for greater or more wages or hire for such service, than according to the rate of *double monthly wages* contracted for with the seamen, mariners, and other persons, hired or engaged to serve on board such ship or vessel, at the time of her then last departure from *Great Britain*, being in the same degree and station, in which such seaman, mariner, or other person should be so hired or engaged at any such port or place as aforesaid; unless the governor, chief magistrate, collector, or comptroller, of such port or place in the said colonies or plantations, should think that greater or more wages or hire, than double the monthly wages aforesaid, should or ought to be given to such seaman, mariner, or other person, as aforesaid, and should accordingly authorize or direct the same to be given by writing under his hand; that then and in such case the master or commander of such ship or vessel, should and might be at liberty to pay, and the seaman, mariner, or other person on board such ship or vessel, to receive *such* greater or higher wages as such governor, magistrate, collector, or comptroller should direct as

(i) 37 Geo. 3, c. 73, s. 1. The regulations made on this subject in France are mentioned in Valin's Commentary on the French Ordin. tom. 1, p. 535.

(j) 37 Geo. 3, c. 73, s. 2. The penalties imposed by this act, were to be distributed one-third to Greenwich Hos-

pital, one-third to the Seamen's Hospital or fund, at the ship's port, and one-third to the informer; and might be recovered by action in the Courts at Westminster; or such as do not exceed 20*l.*, before a justice of the peace.

asforessaid;" and all contracts and securites entered into or given, contrary to the intent and meaning of this act, were made null and void to all intents and purposes; and the master or other person, who should enter into, or give, or procure to be made, entered into or given any such contract or security, or who should hire, or cause to be hired any seaman or other person to enter on board, contrary to the intent and meaning of that act, or who shall pay, or cause to be paid, any greater hire, wages, or other gratuity or advantage whatsoever, than was allowed or directed by that act, should, for every such offence forfeit *one hundred pounds*.

3. § The only matters required to be specified by the first of these acts of Parliament were the rate of wages and the voyage. As the general law sufficiently described the general duties of both parties, in a way which was perfectly adequate to the due enforcement of the contract on each side, more particulars were not necessary or proper to be expressed. Many special stipulations and clauses injurious to the interests of the seamen, were, however, constantly introduced into the contracts in common use (*k*); and the general structure of ships' articles had become so faulty and irregular, that Lord *Stowell*, in a suit for mariners' wages, a short time before he retired from the Bench of the Court of Admiralty, said, that "it would take him a very inconvenient time to point out half the impertinences with which they were stuffed, and which it was high time should be corrected" (*l*).

A remarkable exposure of this species of injustice occurred in the case of the *Minerva* (*k*), where it appeared that an engagement to submit themselves to all the penalties and forfeitures of the 37 Geo. 3, c. 73, (an act, as we have seen, passed for the express regulation of the *West India* trade, in which a prevailing mischief had existed, to which strong preventives, confined exclusively to that commerce, were opposed by the Legislature), had become part of the settled printed form, which mariners, unable to read or write, were required to execute.

The Court of Admiralty, indeed, at all times asserted its right, as a Court of Equity, to examine whether the clauses of ship's articles were reasonable, and, as such, binding on the mariners; but in the Courts of Law, stricter principles of interpretation ob-

(*k*) The *Minerva*, Bell, 1 Hag. Ad. Rep. 347.

(*l*) The *George Home*, Young, 1 Hag. Ad. Rep. 370.

tained, and the ignorance and improvidence of seamen, and their inability to appreciate the meaning and effect of a long multifarious instrument, led to the frequent scandal of cases of great cruelty and injustice.

In the reign of his late Majesty, these evils attracted the attention of the Legislature; and the 5 & 6 Wm. 4, c. 19 (*m*), which recited and repealed all the previous acts upon this subject, was passed "to amend and consolidate the laws relating to the merchant seamen of the *United Kingdom*, and to form and maintain a register of all the men engaged in that service."

By this act it is declared unlawful for any master of any ship belonging to a subject of this kingdom, trading to parts beyond the seas, or of any *British* registered ship of the burthen of eighty tons, employed in any of the fisheries of the *United Kingdom*, or in trading coastwise or otherwise, to carry to sea on any voyage, either from this kingdom or from any other place, any person as one of his crew or complement (apprentices excepted), without first entering into an agreement in writing with him, specifying what monthly or other wages he is to be paid, the capacity in which he is to act, and the nature of the voyage in which the ship is intended to be employed, so that the seaman may have some means of judging of the probable period for which he is likely to be engaged. This agreement must contain the day of the month and year in which it is made, must be signed by the master in the first instance, and by the seaman, at the port or place where he is shipped; and the master must cause the same to be, by or in the presence of the party who is to attest the seaman's signature thereto, truly and distinctly read over to him, before he is required to sign, in order that he may be enabled to understand the purport and meaning of the engagement he enters into, and the terms to which he is bound (*n*).

By this agreement, called "the ship's articles," the form of which, applicable to various trades and voyages, is prescribed, the mariners engage to serve on board the ship on the voyage therein described, to conduct themselves in an orderly, faithful, honest, careful, and sober manner; to be at all times diligent in their

(*m*) 2 & 3 Anne, c. 6; 2 Geo. 2, c. 36; 2 Geo. 3, c. 31; 31 Geo. 3, c. 39; 45 Geo. 3, c. 81; 37 Geo. 3, c. 73; 58 Geo. 3, c. 38; 59 Geo. 3, c. 58; 4 Geo. 4, c. 25; 3 & 4 Wm 4, c. 88.

(*n*) 5 & 6 Wm. 4, c. 19, s. 2.

respective duties and stations, obedient to the lawful commands of the master in every thing relating to the ship and her materials, stores, and cargo, whether on board the ship, in boats, or on shore (o). If, after entering into such agreement, a mariner neglect or refuse to join the ship, on board of which he has been engaged, or to proceed to sea in her, or absent himself without leave, any justice of the peace upon complaint of the fact, made upon oath by the master, mate, or owner of the ship, is required by his warrant to cause the seaman to be apprehended and brought before him; and in case he shall not give a reason, to the satisfaction of such justice, for his neglect, refusal, or absence, as the case may be, such justice may commit him to the house of correction, there to be kept to hard labour for a period not exceeding thirty days. But if the seaman consent to join the ship, the justice, at the request of the master, instead of committing the seaman, may order him to be conveyed on board the ship, or delivered to the master, for the purpose of proceeding on the voyage agreed upon, and may award to the master such costs, not exceeding forty shillings, as to the justice may seem reasonable, and to be abated from the wages of such seaman (p).

In order more effectually to ensure the actual service of seamen engaged to particular ships, it is enacted, that any person who shall harbour or secrete a seaman who has signed an agreement to proceed on a voyage to foreign parts, and who has deserted or absented himself without leave from his ship, knowing or having reason to believe him to be a deserter or absent without leave, shall, for every such seaman so harboured or secreted, forfeit and pay the sum of 10*l.*: that no debt exceeding in amount five shillings, incurred by any seaman after he has signed such agreement, shall be recoverable until the voyage agreed for shall have been concluded; and that no keeper of a public-house, or of a lodging-house for seamen, shall detain any chest, bed, or bedding, clothes, tools, or other effects of any seaman, for any pretended debt alleged to have been contracted by him; and if such property or effects be detained, any justice, if he shall see right, by warrant under his hand and seal, may order them to be seized and delivered over to the seaman (q).

(o) See the form of the ship's articles in the schedules to the statute. Appendix.

(p) 5 & 6 Wm. 4, c. 19, s. 6.
(q) Sect. 10.

This, however, does not extend to prevent any person belonging to a merchant ship from entering into the naval service of her Majesty, and no such entry is to be deemed a desertion from the merchant ship, nor incur any penalty or forfeiture whatever, either of wages, clothes, or effects, notwithstanding any agreement made to the contrary, such agreement being expressly prohibited.

4. The stipulated wages, the amount of which the act requires to be set down in the articles against the name of every seaman, are not the only compensation provided for his faithful service. Regulations are established for the preservation of his health, for his protection in case of accident or illness, his fair treatment at home and abroad, to which it is the duty of the master to conform.

Thus, the agreement into which he enters with the mariners must contain true entries, under their respective heads, of the several particulars set forth in schedules, varying according to the voyage and the ship's employment, and annexed to the act.

The master and owners are bound, on reporting a ship's arrival from "parts beyond the seas," at her port of destination in the *United Kingdom*, to deposit a true copy of this agreement with the collector or controller of the Customs there, that the means of ascertaining the terms and conditions of it may be accessible to all who are interested in it. The masters of ships employed in the fisheries on the *British* coasts, or trading from port to port of the *United Kingdom*, or making regular voyages to the *Channel Islands*, or to ports on the continent of *Europe* between the river *Elbe*, inclusive, and *Brest*, must twice in every year deposit copies of all such agreements entered into by them during the preceding six months (q).

If any master carry out to sea a seaman without having first entered into such an agreement with him, he forfeits the sum of 10*l.* in respect of every seaman so carried out. If he neglect to cause the agreement to be read over to the seaman, he forfeits the sum of 5*l.*, and if he neglect to deposit a true copy of it with the collector or controller of the customs, the sum of 50*l.* (r).

Upon the discharge of a seaman, he is entitled to receive from the master a certificate of his service and discharge, specifying the period of service and the time and place of his discharge, which certificate must be signed by the master; and if the master refuse

(q) 5 & 6 Wm. 4, c. 19, s. 3.

(r) Sect. 5.

to give such certificate without reasonable cause, he forfeits for every such offence the sum of 5*l.* (s), to be paid to the seaman.

Whenever a ship belonging to a subject of the *United Kingdom*, except in cases of wreck and condemnation, is sold at any port out of her Majesty's dominions, the master (unless the crew, in the presence of the *British* consul or vice-consul, or, in case of there not being any such consul or vice-consul, then in the presence of one or more *British* resident merchants, shall signify their consent in writing to be there discharged) is required, besides paying them the wages to which they are entitled under the agreement, either to provide them with adequate employment on board some other *British* vessel homeward bound, or to furnish the means of sending them back to the port in his Majesty's dominions at which they were originally shipped, or to some port in the *United Kingdom* as shall be agreed upon, by providing them with a passage home, or depositing with the consul or vice-consul such a sum of money as he may deem reasonably sufficient to defray the expenses of their subsistence and passage; and if the master neglects so to do, such expenses, when defrayed, are declared to be a charge upon the owner whose ship is so sold (except in cases of barratry, wreck, or condemnation), and may be recovered against such owner as so much money paid and expended on his account, together with full costs, at the suit of the consul or other person defraying such expenses, or of the Attorney-general on behalf of his Majesty, if the same shall have been allowed to the consul out of the public monies (t).

Great mischiefs having arisen from masters of merchant ships leaving seamen in foreign parts, who had been thus reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves; it is enacted, "that if any master of a ship shall force on shore and leave behind, or otherwise wilfully and wrongfully leave behind, on shore or at sea, in any place out of his Majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the *United Kingdom*, or before the completion of the voyage or voyages for which such person shall be engaged, whether such person shall have formed part of the original crew or not, every person so offending shall be deemed guilty of a misdemeanor, and shall suffer such punish-

(s) 5 & 6 Wm. 4, c. 19, s. 13.

(t) Sect. 17.

ment, by fine or imprisonment, or both, as to the Court before whom he shall be convicted shall seem meet (t). And the said offence may be prosecuted by information at the suit of the Attorney-general, on behalf of his Majesty, or by indictment or other proceeding, in any Court having criminal jurisdiction in his Majesty's dominions at home or abroad, where such master or other person shall happen to be, although the place where the offence may be therein averred to have been committed (which is required to be stated substantially according to the fact), shall appear to be out of the ordinary jurisdiction of the Court.

It is further provided, that the master shall not discharge any of his crew, whether foreigner or *British* subject, at any of his Majesty's colonies or plantations without the sanction in writing of the governor, secretary, or other officer appointed in that behalf, or in the absence of such authorities near the place where the ship is lying, then of the chief officer of Customs resident at or near such place, nor at any other place abroad without the sanction in writing of his Majesty's minister, consul or vice-consul, or in their absence, of two respectable merchants resident there, all which said functionaries and merchants are empowered to inquire in a summary way into the grounds of such proposed discharge, by examination on oath, and to grant or refuse such sanction according to their discretion (u). And no master shall leave behind at any place abroad, any person of his crew on the plea of such person not being in a condition to proceed on the voyage, or having deserted from the ship, unless upon a previous certificate in writing from such functionary or merchant, if there be any such within reasonable distance, and there be time to procure the same, certifying that the person so intended to be left, is not in such condition, or has deserted and disappeared and cannot be brought back, and such functionaries are authorized, on the application of any such master, to inquire by examination on oath into the circumstances, and give or refuse such certificate according to the result of such examination (v).

5. For the preservation of the health and lives of the seamen employed in the merchant service, every ship sailing from the *United Kingdom*, to any place out of the same, must keep constantly on board a sufficient supply of medicines suitable to acci-

(t) 5 & 6 Wm. 4, c. 19, s. 40. •

(u) Sect. 41.

(v) Sect. 42.

dents and diseases arising on sea voyages, which shall be renewed from time to time as shall be found requisite; and if default shall be made in providing or keeping supplied such medicines, or in case any of the seamen shall receive any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice, and attendance, and medicines, which the seaman may stand in need of, until he is cured or brought back to some port of the *United Kingdom*, must be borne and defrayed by the owner and master of the ship, or one of them, without any deduction whatever on that account from the seaman's wages (*w*).

6. Such are the principal clauses of this important and politic enactment relating to the hiring and treatment of mariners. It contains other provisions respecting the earning, payment and forfeiture of wages, which will be noticed in the following chapters of this part, as also for the binding of and regulation of apprentices (*x*) in the merchant service, for the keeping of a muster roll of the crew, including master and apprentices, in a form prescribed by the act (*y*), the production of it, as well as of the ship's articles by the master, when required to officers of his Majesty's ships (*z*), the collectors or chief officers of the Customs at the several ports of the *United Kingdom*, and of the *British* possessions abroad, and to the registrar and his assistants (*a*) in the "general register of the merchant seamen" which the act establishes (*b*). §

7. The statute does not render a verbal agreement for wages absolutely void; but imposes a penalty on the master, if a written agreement is not made. When a written agreement is made, it becomes the only evidence of the contract between the parties; and a mariner cannot recover any thing agreed to be given in reward for his service, which is not specified in the articles: this has been decided with respect to a promise to pay to the mate of a ship employed in the slave trade, the average price of a slave at the place of the ship's destination (*c*); and also with respect to a promise to pay to a sail-maker, serving in a ship belonging to the *East India* Company, a monthly sum beyond the wages men-

(*w*) 5 & 6 Wm. 4, c. 19, s. 18.

(*x*) Sect. 26 to 39.

(*y*) Sect. 21 and 22.

(*z*) Sect. 50.

(*a*) Sect. 51.

(*b*) Sect. 10.

(*c*) *White v. Wilson*, 2 Bos. & Pull. 116, and the *Isabella*, Brand, 2 Rob. Ad. Rep. 241.

tioned in the ship's articles, which had been signed by him as sail-maker (*d*).

8. A seaman, who has engaged to serve on board a ship, is bound to exert himself to the utmost in the service of the ship; and therefore a promise made by the master *when a ship was in distress*, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, was at a trial before the late Lord *Kenyon* esteemed to be wholly void (*e*). So where two of the crew deserted in the course of a voyage, and the master having in vain attempted to supply their places at *Cronstadt*, entered into an agreement with the rest of the crew at that place, to divide among them the wages of the deserters, if he should not be able to procure two other men at *Gottenburgh*, which in fact he could not do, Lord *Ellenborough* decided that the engagement was wholly void. It was attempted to distinguish this case from the foregoing, by suggesting that the agreement was made on shore, when the master could not be supposed to be under any restraint or apprehension, and not at sea, in a moment of peril, like the former case: an obvious answer to this would be, that if the master had not been apprehensive of further desertion, he would not have made such a promise; but the Chief Justice, in his own manly and dignified manner, decided the case upon the general ground. "There was," said his Lordship, "no consideration for the ulterior pay promised to the mariners, who remained with the ship; before they sailed from *London*, they had undertaken to do all they could under all the emergencies of the voyage; they had sold all their services till the voyage should be completed." "The desertion of a part of the crew is to be considered an emergency of the voyage as much as their death, and those who remain, are bound by the terms of their original contract to exert themselves to the utmost to bring the ship in safety to her destined port" (*f*).

9. In this, as in all other cases, an engagement for service, made in contravention of the rules of the Common or Statute Law, will be void (*g*).

(*d*) *Elsworth and Wife v. Woolmore*, Guildhall, Sit., Dec. 1803, before Lord Alvanly, Ch. J. There is a note of this case in Mr. *Espinasse's* N. P. C. vol. 5, p. 84.

(*e*) *Harris v. Watson*, Peack's N. P. C. 72

(*f*) *Stilk v. Myrick*, 2 Campb. 317. See also *Thompson v. Havelock*, 1 Campb. 527.

(*g*) *The Vanguard*, Pince, 6 Rob. Ad. Rep. 207.

CHAPTER II.

OF THE EARNING AND PAYMENT OF WAGES.

I PROPOSE in the present chapter to consider, FIRST, the cases in which the *whole* wages agreed to be given to seamen are to be paid; SECONDLY, the cases in which a *part* only is to be paid; and, LASTLY, the *time* at which the payment is to be made. All that is said in this and the following chapter respecting seamen, is to be understood of all the officers in the ship, except the master, and of him also, if the subject is not inapplicable to his situation and character.

1. FIRST, it is obvious, that a seaman who has faithfully performed his service on board a ship during the whole period of the intended voyage, is entitled to receive the whole of the stipulated reward, if no disaster has rendered his service useless or unproductive to his employer. And as a seaman is exposed to the hazard of losing the reward of his faithful service during a considerable period in certain cases, so on the other hand the law gives him his whole wages, even when he has been unable to render his service, if his inability has proceeded from any hurt received in the performance of his duty, or from natural sickness happening to him in the course of the voyage (*a*). And if a master, in violation of his contract, discharges a seaman from the ship during a voyage, the seaman will be entitled to his full wages up to the prosperous termination of the voyage, deducting, if the case require it, such sum as he may in the meantime have earned in another vessel (*b*).

(*a*) Laws of Oleron, art. 6 and 7 of Wisbuy, art. 19 of the Hanse Towns, art. 39 and 45. same of the year 1614, tit. 14, art. 1; French Ordin. liv. 3, tit. 4; Des Loyers des Matelots, art. 11; Code de Com. art. 262; Chandler v. Grieves, 2 Hen. Black. 606, note (*a*), and by Lord Mansfield in the case of Paul v.

Eden, in the King's Bench, East. Term, 25 Geo. 3.

(*b*) Robinet v. The ship Exeter, 2 Rob. Ad. Rep. 261; the Beaver, Grieson, 3 Rob. Ad. Rep. 92; Roccus, not. 43; Old Hanseatic Ordinance, art. 42; Hanseatic Ordinance of 1614, tit. 3, art. 7.

The *French* ordinance adds, that in such cases the master shall not charge the owners with the payment (c). A seaman is to be found with provisions as long as he remains on board, and is willing to do his duty; if there be a want of sufficient provisions, it is a sufficient justification for his leaving the vessel, and will not deprive him of his right to his wages (d).

Since the earlier editions of this Treatise, the novel case has been presented to the Court of Admiralty of a woman applying for wages for service performed on board a ship. The claim was made for work in two capacities; one as cook and steward, the other as keeper of the ship and her stores, in harbour or dock; the claimant had acted also as a mariner in a great degree. After the performance of the service, payment was resisted, on the ground of the sex of the applicant. The learned Judge, who presides in that Court, said, that the material point for the Court to look to, was the work done; for supposing an informality in the mode of hiring, still, if the work had been done, and properly done, it entitled the performer to the common remuneration for such employment (e).

In the discussion of the cases that arose on the detention of the *British* ships in *Russia* by the Emperor *Paul* in the year 1800, it was admitted in both Courts, that in the ordinary case of an embargo, a seaman hired by the *month*, and remaining with the vessel, has a right to his wages during the embargo, if the ship afterwards perform her voyage and earn her freight (f). The circumstances of that detention were very peculiar. The cases will be more fully stated when I come to the consideration of the loss of wages (g).

2. SECONDLY, it was determined before the passing of the repealed statutes, by which the service of seamen in merchant ships was regulated, that a seaman who was impressed from such a ship into the royal service, was entitled to receive a proportion of his wages up to the time of impressing, *the ship having afterwards arrived in safety at her port of discharge* (h). It has also been since decided that

(c) Liv. 3, tit. 4; *Loyers des Matelots*, art. 10, and also the *Code de Com.* art. 270.

(d) *Castilia, Stewart*, 1 Hag. Ad. Rep. 59. See also *Eliza, Ireland*, id. p. 186.

(e) *Jane and Matilda, Chandler*, 1

Hag. Ad. Rep. 187.

(f) *Beale v. Thompson*, 3 Bos. & Pull. 405, and 4 East, 546.

(g) Chap. 3 of this part, sect. 2.

(h) *Wiggins v. Ingleton*, 2 Lord Ray. 1211.

he was entitled to no more (i). The first of those statutes expressly provided, that a seaman belonging to any merchant ship, who entered into the service of his Majesty on board any of his Majesty's ships, should not for such entry forfeit the wages due to him during the term of his service in the merchant ship, nor should such entry be deemed a desertion (k). It has also been decided, that a seaman belonging to a privateer, who was to have a certain share of prizes in lieu of wages, and who had engaged to serve full six months on pain of forfeiting such share, did not lose his share of a prize taken while he was in the privateer, by being afterwards impressed, and then accepting the bounty, and entering on board one of his Majesty's ships before the expiration of the six months (l). But entering, or being impressed into the King's service, was considered not to give the mariner an *absolute* right to his wages up to the time, nor place him in a better condition as to such wages, than he would be if he had remained on board the ship; and therefore, if the ship were afterwards captured, he lost his wages in common with those whom he left behind (m).

§ By the 5 and 6 Wm. 4, c. 19, it is enacted, that notwithstanding any agreement to the contrary, entry into the naval service of his Majesty of any seaman in the merchant service, shall not be deemed a desertion, or incur any penalty or forfeiture whatever, either of wages, clothes, or effects, or other matter or thing (n). And that when any seaman shall quit a merchant ship in order to enter into the naval service of his Majesty, and shall thereupon be received into such service (not having previously committed any act amounting to and treated by the master as a total desertion,) he shall be entitled immediately upon such entry to the delivery up of all his clothes and effects on board such merchant ship and (in case the ship shall have earned freight) to receive from the master the payment of the proportionate amount of his wages up to the period of such entry, either in money or by a bill on the owner of such merchant ship; all which clothes, effects, money and bill such master is required to deliver up to him accordingly, under a penalty of 25*l.* for any refusal or neglect, to be recovered with full costs of suit. If no freight shall have been earned at the

(i) *Clements v. Mayborn*, in the King's Bench, Trin. Term, 24 Geo. 3.

(k) 2 Geo. 2, c. 36, s. 13.

(l) *Paul v. Eden*, in the King's Bench,

Easter Term, 25 Geo. 3.

(m) Anon. 2 Campb. 320, note.

(n) Sect. 45.

time of such entry, then the master is required to give the seaman so entering a bill upon the owner for his wages to the period of such entry, payable on the ship's safe arrival at her destined port; but in case the master shall have no means of ascertaining the balance due, he shall deliver to the seaman a certificate of the period of his services, and the rate of wages he is entitled to, producing at the same time to the commanding officer of his Majesty's ship the agreement entered into with the seaman for the voyage, and the master is thereupon entitled to receive from the officer of his Majesty's ship a certificate, testifying that the seaman has entered into such ship of his Majesty to serve, as proof that the master has not parted with the seaman contrary to the provisions of the act (o). §

3. If a seaman falls sick and dies during the voyage, the laws of *Oleron*, (p), of *Wisbuy* (q), and of the *Hanse Towns* (r), direct that his wages shall be paid to his heirs, in general words, without distinction as to the terms upon which he was hired: and it is not clear whether the payment thus directed, is to be understood of a sum proportionate to the time of his service, or of the whole sum that would have been earned if he had lived to the end of the voyage. The *French Ordinance* distinguishes between the case of a hiring by the *month*, and a hiring for the *voyage*; and in the first case directs the payment of wages up to the day of the death of the seaman: in the last case, it directs the payment of half the stipulated sum, if a seaman dies on the voyage outward, and the whole if he dies on the voyage homeward (s). A similar rule had been laid down in the case of a hiring by the voyage, in the Ordinance of the Emperor *Charles the Fifth* (t), which regulated the commerce of the Low Countries; and *Cleirac* and *Valin* (u) say, that the same rule was established by the *Consolato del Mare*. There is no general decision on this subject in our law books; but the legislature appears to have considered that some wages might be owing to seamen, who died in the

(o) Sect. 46.

(p) Art. 7.

(q) Art. 19.

(r) Art. 45.

(s) Liv. 3, tit. 4; *Loyers des Matelots*, art. 13 and 14. The same rule is laid down in the *Code de Com.* which

also gives half the wages if the mariner dies at the outward port; art. 265.

(t) *Cleirac* on the 7th article of the laws of *Oleron*.

(u) On the *French Ordinance*, ubi supra.

course of a voyage (*v*); and in the case which I am about to quote it seems to have been admitted, that the representatives of a seaman hired by the *month*, would be entitled to a proportion of wages to the time of his death. The facts of the case referred to were very peculiar, and the decision turned upon them. Before the passing of the statute (*w*) which limited the wages to be given to persons for navigating a ship back from the *West Indies* to this country, one *Cutter* was hired as second mate on a voyage from *Jamaica* to *Liverpool*; and at *Jamaica* the master subscribed and delivered to him the following note: "Ten days after the ship *G. P.*, myself master, arrives at *Liverpool*, I promise to pay Mr. *T. Cutter* the sum of thirty guineas, provided he proceeds, continues, and does his duty as second mate in the said ship, from hence to the port of *Liverpool*. *Kingston*, July 31st, 1793." The ship sailed from *Kingston* on the 2nd of *August*, and arrived at *Liverpool* on the 9th of *October*. *Cutter* went on board the 31st of *July*, sailed in the ship, and proceeded, continued, and did his duty as second mate until his death, which happened on the 20th of *September*. It was proved that the wages usually paid to a second mate of a ship on such a voyage, if hired by the month out and home, were 4*l.* per month: that when seamen were shipped by the run from *Jamaica* to *England*, a gross sum was usually given; and that the usual length of a voyage from *Jamaica* to *Liverpool* was about *eight* weeks. The executrix of *Cutter* brought an action against the master, and it was contended on her behalf, that she ought to recover a proportion of the wages for that part of the voyage that he lived, and served on board the ship. The Court of King's Bench, before which this question was brought for decision, directed inquiry to be made as to the usage among merchants, &c., in cases of this kind; but no satisfactory information being obtained as to the usage, although such notes had been often given, the Court, upon consideration of the particular terms of the note, and of the great excess of the sum to be paid to *Cutter*, if he had performed the whole voyage according to those terms, above the usual rate of wages upon a monthly hiring, decided that nothing was payable for the partial service:

(*v*) 37 Geo. 3, c. 73, s. 7, and 6 Geo. 4, c. 107, s. 15.

(*w*) 37 Geo. 3, c. 73, s. 3.

declaring at the same time, that if the plaintiff could have proved a usage to pay a proportional sum in similar cases, their decision should have been conformable to the usage (x).

In a subsequent case also, it was taken for granted, that some wages were due to the mate of a *West India* ship, who had died on the homeward voyage. The master had, in pursuance of the directions of the statutes before mentioned (y), paid to the receiver of the sixpenny duty for Greenwich Hospital the sum of 9*l.* as the full amount of the wages due. The administratrix of the deceased, contending that more than 9*l.* was due, brought an action against the master, who insisted that as he had accounted upon oath according to the directions of the statute, the amount of the sum due could not be questioned in such an action, but he must be sued for the penalty given by the statute, if his account was false. But the Chief Justice of the Court of Common Pleas (Sir *James Mansfield*) before whom the cause was tried, and afterwards the whole Court, held that the statute did not deprive the administratrix of her right to sue the master for all that was justly due beyond the sum paid to the officer, and as the jury had found 25*l.* to be due, she was allowed to recover 16*l.* (z).

§ By the statute 4 and 5 *Wm.* 4, c. 52, it is enacted, that all sums of money which shall be due for wages to any seaman hired on board a *British* merchant ship, in any port of *Great Britain* or *Ireland*, who shall have died on board during the voyage, shall within three months after the arrival of the ship in any port of the United Kingdom, be paid to the trustees of the port to be appointed in pursuance of that act, or where no such trustee, to the receiver, collector, or other authorized agent of the President or Governors for the relief and support of maimed and disabled seamen, incorporated by that act, for the use of the executors and administrators of the deceased seaman; and in case no claim shall be made for such wages within one year afterwards, that then the trustees of the said port shall remit the amount to the collector, receiver, or other agent of the President and Governors of the port of *London*, for the use of such executors or administrators; and if no

(x) *Cutter v. Powell*, 6 Term Rep. 4, c. 107, s. 15.
K. B. 320.

(z) *Armstrong v. Smith*, 1 Bos. & Pull. N. R. 299.

(y) 37 Geo. 3, c. 73, s. 7, and 5 Geo.

claim shall be made within another year then following, that the President and Governors may direct such wages to be paid over without interest to the widow, or if there be no widow claiming, to the lawful issue, or such persons as would be entitled under the statute of distributions; and lastly, that if after a third year no claim be made, the money shall be applied in aid of the funds of the institution (a). §

4. The payment of wages is generally dependent upon the payment of freight: if the ship has earned its freight, the seamen, who have served on board the ship, have in like manner earned their wages. And as in general, if a ship destined on a voyage out and home has delivered her outward bound cargo, but perishes in the homeward voyage, the freight for the outward voyage is due, so in the same case the seamen are entitled to receive their wages for the time employed in the outward voyage and the unloading of the cargo, unless by the terms of their contract the outward and homeward voyages are consolidated into one (b). And if a ship sails to several places, wages are payable to the time of the delivery of the last cargo. Upon the same principle, where money had been advanced to the owners in part of the freight outward, and the ship perished before her arrival at the port of delivery, it was held that the seamen were entitled to wages in proportion to the money advanced (c). If, as sometimes happens, a charter-party be so framed as to exclude the owners from demanding freight for the carriage of the outward-bound cargo, unless the ship brings back her homeward-bound cargo in safety, it seems that such a special agreement, whereby the owners consent to relinquish a benefit to which they are entitled by the general principles of law, ought not to affect the seamen, or deprive them of their general right, unless *they* also by the terms of their contract make the like engagements on their part. Indeed, it was once decided in the Court of Admiralty that the seamen, who had navigated a ship chartered by the *East India Company*, and which had delivered her outward-bound cargo in the *East Indies*, but was lost in the homeward voyage, were entitled to recover wages for the outward voyage from the master, although the owners had covenanted with the Company not to demand any freight beyond

(a) Sect. 30.

(b) Anonymous, 1 Lord Raym. 639,
739; 12 Mod. 408; Ordin. of Rotter-

dam, art. 214; 2 Magens, 113.

(c) Anon. 2 Show. 283.

the impress money, of which the seamen had received their share, unless the ship returned home in safety; and although the mariners themselves had given bonds to the master to the same effect with regard to their wages (*d*). *And Chief Justice Holt is said to have decided a cause tried before him in the same manner (e).* But this decision of the Court of Admiralty is reported to have been disapproved of by the House of Lords, who in a case arising out of it between the master and the owners, gave liberty to the parties to appeal to the Delegates against the decision (*f*). Indeed, I am at a loss to find any principle upon which the Court of Admiralty could have held these bonds to have been void, and have thought the seamen entitled to more than a proportion of the advance money, unless the bonds were deemed to have been *obtained by oppression or fraud*. It has of late years been usual to stipulate by express terms in the articles of agreement signed by the seamen employed in such ships, that in case the ship shall by the danger of the sea, or any other accident whatsoever, be disabled or lost during the voyage for which she is destined, so that she do not return to and arrive at the port of *London*, the seamen shall not receive or claim any further wages than the impress money paid to them in advance, notwithstanding the ship shall at any time, before her being so disabled or lost, have broke bulk, or delivered any goods, at any port or place whatsoever. And there is no instance of a claim made by the seamen against the terms of this clause in the articles.

By articles of agreement, in the form usual before the recent act and containing the common stipulation, that "no seaman should demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at her above mentioned *port* of discharge, and her cargo delivered;" it was stated that the ship was bound for the ports of *Madeira*, any of the *West India* islands or *Jamaica*, and to return to *London*; and in consideration of the monthly or other wages therein mentioned, the seamen severally undertook to perform *the above-mentioned voyage*, and the master agreed with and hired them for the *said voyage*. The ship sailed from *London* with a full cargo for *Madeira*, and delivered it there, and took in a full cargo of wine: and sailed for the *West Indies*.

(*d*) *Buck v. Rawlinson*, 1 Bro. P. C. 102.

(*f*) *Buck v. Rawlinson*, 1 Bro. P. C. 102.

(*e*) *Edwards v. Child*, 2 Vern. 727.

Part of the wine was delivered at *Dominica*, and another part at *Kingston* in *Jamaica*, and at this latter place the ship took in some Government stores for *Port Antonio* in *Jamaica*, which she delivered there, and then proceeded to *Martha Bray* in the same island, where she delivered the remainder of the wine, and took in her cargo for *London*; for which place she soon afterwards sailed, but was lost on the voyage home. One of the seamen who had been hired at monthly wages, brought an action, contending that the voyage was divided into three distinct parts, *vis. Madeira*, the *West Indies*, and *home*, and that as freight had been earned for the two first parts, he was entitled to his wages up to the time of the ship's departure from *Martha Bray*. But the Court holding that the port of discharge mentioned in the articles meant *London*, determined that by reason of the special stipulation he could recover nothing (*g*).

§ From this doctrine, the Court of Admiralty assuming all such clauses to be the result of an unconscientious (*h*) advantage taken of the ignorance or the necessities of the seamen, resolutely withheld its countenance, and Lord *Stowell*, in the case of the *Juliana* (*i*) most emphatically expressed his condemnation of it. The facts of that case were as follows: *William Lattimore*, a seaman, was hired in August, 1820, to proceed at certain wages on board the *Juliana* from *Portsmouth* on a voyage to *New South Wales*, *Batavia*, *Bengal*, and back to *London*. She accordingly sailed with a cargo of convicts, to the river *Derwent*, in *New South Wales*, arrived and landed them there, took on board live stock and salt provisions and sailed to *Port Jackson*, where she delivered that cargo; and then sailed to *Batavia*, where she took in a cargo of poultry, which she partly delivered at *Minto*, and then sailed to *Serampore*, where she delivered the remainder and took in sugar for *England*, and various goods for *Calcutta*, at which place she discharged the latter goods and took in other articles for *England*. In the month of December, 1821, she arrived in the *Downs*, where, having struck on the *Kentish Knock*, she was wrecked, and every soul on board perished except *Lattimore* and another, who were picked up by a fishing boat. It was admitted

(*g*) *Appleby v. Dods*, 8 East, 300.

(*h*) But see the case of the *Hoghton*, *Brady*, 3 Hag. Ad. Rep. 100, where a clause, usual in the Baltic trade, that, in case the ship should winter abroad, on

account of the ice, the officers and men agreed to accept half wages, was upheld by Sir John Nicholl.

(*i*) 2 Dods. Ad. Rep. 610.

that freight to the amount of 3000*l.* at least had been earned, and that during the whole of the voyage, the seaman well and ably performed his duty, but his claim for wages was met by alleging the stipulation in the articles, "that no officer or seaman should demand or be entitled to his wages, or any part thereof, until the arrival of the ship at the above-mentioned port of discharge and her cargo delivered," and it was further pleaded that by the above mentioned port of discharge was meant and intended the port of *London*, and that the ship was totally lost, together with her cargo on her return to, and before her arrival in *London*, and before any part of her cargo had been delivered.

Lord *Stowell*, after an elaborate review of the decisions upon this question, and particularly that of Lord *Holt*, in the case of *Edwards v. Child* ^(m), expressed himself as follows: "This Court certainly does not claim the character of a Court of general Equity, but it is bound, by it's commission and constitution, to determine the cases submitted to it's cognizance upon equitable principles, and according to the rules of natural justice. How far a Court of law would limit its views of the question to the letter of the contract, and leave these improvident mēn to find their way in a Court of Equity, out of a bargain which that Court has deemed unreasonable, when it appeared in another form substantially the same, I am not enabled to pronounce. There are those who might, perhaps, lament, if this humble class of suitors were compelled to a pilgrimage through a second Court. This Court is not disposed to put that burthen upon them; it will, as far as it can, protect these illiterate and inexperienced persons against their own ignorance and imprudence. And I confess I feel disposed to do so more in the case of these articles than in the case of articles and bonds; because I think it much more probable that covenants, bearing hard upon them, should slip unnoticed, into articles which they execute as mere formal instruments of course, than into bonds, which are instruments of rare occurrence to them, and by which their curiosity would naturally be excited and alarmed. I may add, that the terms in which the stipulation appears, might probably be understood by the mariners, as they are actually understood by the Courts of *Scotland* ⁽ⁿ⁾, to signify only a postponement of the payment, not a privation of the title which the law had

(m) *Ante*, p. 559.

(n) *Commentaries on the Law of Scotland*, vol. 1, p. 515.

guaranteed to them. The words are sufficiently satisfied by that interpretation, and I infer from the present case that the mariners so understood them ; otherwise they might be charged with a want of that good faith with which they have a right to be credited, if they were now resisting a claim which they fully understood and admitted at the date of the agreement. I reject this article of the allegation, and shall, of course, proceed upon the summary petition, and if it be duly supported by proof, shall feel myself bound by law, authority and justice to pronounce for the wages on the outward voyages."

The principles upon which this judgment proceeded have been repeatedly avowed and acted upon in the Courts of the *United States*. It is cited by Mr. Justice *Story* (o) and Chancellor *Kent* (p), with approbation, as deciding " that where a voyage is divided by various ports of delivery, a proportional claim for wages attached at each of such ports ; and that all attempts to evade or invade that title, by renunciations obtained from the mariners without any consideration, by collateral bonds, or by contracts inserted in the body of the shipping articles, were ineffectual and void."

The possibility of reconciling this judgment with the principles of construction by which the Courts of Common Law are governed became the subject of discussion before the Court of Exchequer, in the recent case of *Jesse v. Roy* (q). It was an action brought by the administrator of a deceased seaman, for one moiety of a share of a cargo of sperm oil, on articles of agreement, whereby the deceased agreed to serve on board the ship *Royalist*, bound from *London* to the *South Seas*, on a whaling adventure, and to return thence with to *London*, where the voyage was to end. The articles contained a stipulation, " That no one of the officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo until the arrival of the said ship or vessel at *London* ; and her cargo shall be then sold and delivered, and the money for the same actually received by the owner ; nor unless he shall have well and truly performed the above-mentioned voyage, according to the true intent and meaning of the articles." A cargo of oil was procured ; but the ship was afterwards condemned

(o) American edition of this work, p. 448.

(p) Kent's Commentaries, Edinburgh edition, p. 186.

(q) 4 Tyrwh. 626, 1 C. M. & R. 316.

in a foreign port, and the cargo transhipped and despatched in another vessel, on board which the seaman was returning home when he died. Lord *Lyndhurst*, C. B., in the course of the case, which was twice argued, directed the attention of the counsel for the plaintiff to the question, whether the words "until the arrival of the said ship at *London*," might not be construed as merely regulating the time and place of payment, and not as a condition precedent; and his Lordship said, that the decisions of the Courts in *America* (r), which had been cited in the argument to that effect, were entitled to great consideration.

The Court, however, finally decided, that on the principles applicable to the interpretation of contracts in Courts of Common Law, the clause was clear and distinct, and that the plaintiff could not recover on the articles.

This difference, we have seen, has since been composed by the legislature; it being enacted by the 5 & 6 Wm. 4, c. 19, s. 5, "That no clause in the agreement, whereby a seaman shall consent to forego the right which the maritime law gives him to wages in the case of freight earned by ships subsequently lost, or containing any words to that effect, shall be valid or binding on any seaman signing the same." §

5. If after the hiring of seamen, the owners of a ship do not think proper to send her on the intended voyage, the seamen are to be paid for the time during which they may have been employed on board the ship (s). And if they sustain any special damage by breaking off the contract, it seems reasonable also that they should recover such damage by an action upon the agreement. The *French* Ordinance also directs the payment of wages for the time employed in equipping the ship in two other cases (t), which I do not find mentioned in the more ancient sea laws; these are, the prohibition of commerce by the government of the country, to which the ship belongs, with the country to which it is destined, (which must always take place if a war happens between the two countries) and an embargo imposed in the lading port. The latter case does not in general dissolve the contract between the owners and the merchant by the law either of *France*

(r) Kent's Commentaries, Edinburgh edition, p. 188, and the cases cited in the notes of Mr. Justice Story to the American edition of this work, p. 448.

(s) Wells v. Osman, 2 Lord Raym.

1044.

(t) Liv. 3, tit. 4; *Loyers des Matelots*, art. 4 and 5; Code de Com. art. 253.

or *England*, as I have already mentioned (*q*), yet it may be reasonable on such an occasion to discharge the greater part of the mariners, who may readily find in other ships an employment equally beneficial to themselves, and are, therefore, not likely to sustain or recover special damage to any considerable amount by the non-performance of the contract made with them. But if they continue with the ship, they will, if hired by the *month*, be entitled to their wages during the period of detention (*r*).

6. In the case of shipwreck it is the duty of the seamen to exert themselves to the utmost, to save as much as possible of the vessel and cargo. If the cargo is saved, and a proportion of the freight paid by the merchant in respect thereof, it seems upon principle that the seamen are also entitled to a proportion of their wages; and this is expressly directed by the *French Ordinance* (*s*). And for their labour in saving the cargo or the remains of the ship, they, as well as other persons, may be entitled to a recompense by way of salvage, if the circumstances do not entitle them to wages. By the laws of *Oleron* (*t*), if, in the case of shipwreck, "the seamen preserve a part of the ship and lading, the master shall allow them a reasonable consideration to carry them home to their own country; and in case they save enough to enable the master to do this, he may lawfully pledge to some honest persons such part thereof as may be sufficient for the occasion." By the laws of *Wisbuy* (*u*), "the mariners are bound to save and preserve the merchandize to the utmost of their power; and whilst they do so (*ce faisant*, according to the *French* translation), ought to be paid their wages, otherwise not." By the *Hanseatic Ordinance* (*v*), "if a ship happens to be cast away, the mariners are obliged to save as much as in them lies, and the master ought to requite them for their pains to their content, and convey them at his own charge to their dwelling places; but if the mariners refuse to assist the master, in such case they shall have neither reward nor wages paid them." It is not quite clear from the language of these ancient Ordinances, whether the payment directed to be

(*q*) Ante, part 4, chap. 12, s. 4.

(*r*) *Beale v. Thompson*, 3 Bos. & Pull. 405. In the case of arrest during the voyage, the Code de Com. gives to seamen hired by the month, half their wages during the detention, art. 254.

(*s*) Liv. 3, tit 4; *Loyers des Matelots*, art. 9.

(*t*) Art. 3.

(*u*) Art. 15. According to the translation in *Malynes*.

(*v*) Art. 44.

made to seamen on those melancholy occasions, is to be a reward only for their labour in the salvage, or a recompense for their former services in the ship. But *Cleirac*, in his commentary on the laws of *Oleron* (*v*), says, that by an Ordinance of *Philip the Second of Spain*, made in the year 1563 (*w*), it is ordained, that the seamen shall save as much as they can from shipwreck, and in that case the master is bound to pay them their wages, and to give them a further reward for their labour out of the goods. And the *Hanseatic* Ordinance of the year 1614 (*x*) expressly directs, that if so much of the ship be saved as equals the value of the wages of the seamen, they shall be paid their whole wages. In like manner, the Ordinance of *Rotterdam* (*y*), and the *French* Ordinance (*z*), also expressly direct the payment of wages out of the relicts and materials of the ship.

There was not until very lately any known decision of a *British* Court on this point. But the question having been brought before the Court of Admiralty, in a case where the parts of a stranded ship were sold for more than sufficient to pay the wages of the seamen, no part of the cargo having been saved, and the seamen having exerted themselves very laboriously to save the parts of the ship, and not having departed until they were dismissed by the master, Lord *Stowell*, after reviewing and commenting upon the several foreign authorities on the subject, admitted the claim of the seamen, who thereupon received their wages from the owners (*a*).

§ In the course of his judgment, his Lordship expressed his dissent from an opinion which has long prevailed, and is now established, in the Courts of *America* (*b*), that the mariners' right to wages in such cases is in the nature of a claim for salvage remuneration. After stating the duty of the mariner in cases of shipwreck to save as much of the ship and cargo as he can, his Lordship continues: "I ask, is he to have no recompense for this continuation of his service in the most formidable shape, which that service to that ship can assume? Nobody, I think, ventures to say that; but,

(*v*) Art. 3.

(*w*) Tit. Average, art. 12.

(*x*) Tit. 9, art. 5.

(*y*) Art. 219; 2 *Magens*, 114.

(*z*) Liv. 3, tit. 4; *Loyers des Matelots*, art. 9, and *Valin* thereon, and see *Code de Com.* art. 259.

(*a*) *Neptune*, Clark, 1 *Hag. Ad. Rep.* 227. The judgment of Lord *Stowell* is peculiarly worthy the attention of the reader.

(*b*) See note to American edition by Mr. Justice *Story*, p. 451.

say they, he should have it by way of salvage, or on a *quantum meruit*. There are, I think, decisive objections to both these views of the matter. What is a salvor? A person who, without any particular relation to a ship in distress, proffers useful service, and gives it as a volunteer adventurer, without any pre-existing covenant that connected him with the duty of employing himself for the preservation of that ship;—not so the crew, whose stipulated duty it is (to be compensated by payment of wages) to protect that ship through all perils, and whose entire possible service is pledged to that extent. Accordingly, we see in the numerous salvage cases that come into this Court, the crew never claim as joint salvors, although they have contributed as much as (and perhaps more than) the volunteer salvors themselves. The general rule is strong and inflexible, that they are not permitted to assume that character. As the law stands generally, they are excluded from it on just grounds.

“A proceeding for salvage would be less beneficial and safe for the owners, if permitted. In a salvage case, you must take into consideration the question of personal danger incurred, the value of the property saved, and other circumstances, which may influence the demand of salvage; whereas the rule of wages presents only a stipulated sum, which in no case can be exceeded. By the same rule, every temptation to throw the ship into situations of danger, with a view to extravagant salvage, is effectually removed, for no increase of danger can bring to the mariner an increase of profit.

“On all views of the relative justice between the parties, and of the public policy and convenience, there can be no doubt that the rule of wages has the advantage upon the clearest grounds; but take it upon the most naked principles of law applying to it,—the contract covers the whole ship, one part as well as another, and no one part more than another, with the mariner’s lien. A part separated by a storm is not disengaged by that accident from that lien. If it be recovered, it is recovered as part of the primitive pledge mortgaged to the mariner. Again, when does the authority of the master cease? His authority does not certainly merge in the misfortune, nor are the seamen at liberty, without staying a reasonable time for the recovery of parts of the ship and cargo (if there be any prospect, in his judgment, of such recovery), immediately to disperse themselves over the country on whose shores they have encountered the mischance, without

some discharge from him. The duty of service survives as long as the rights of authority exist; these relations are created by the same contracts; they have a cotemporary origin and a corresponding termination on all just construction of that contract.

"I adhere to the spirit—I had nearly said to the letter—of what I am reminded of having said in a former case, not exactly upon this question, that 'a seaman had a right to cling to the last plank of his ship in satisfaction of his wages, or part of them.' Be it remembered, that by the general and just policy of all maritime states, the total loss of the ship, occasioned solely by the act of God, visiting the deep with storms and tempest, brings with it the loss of all the earned wages (except advances), although the general rule of law is, that the act of God prejudices no man; and although the mariner has contributed nothing to the mischance, but exerted his utmost endeavours to prevent it; and although he is prohibited by law from protecting himself from loss by insurance, as his owner is empowered to do for his; it is surely a moderate compensation for these disadvantages that he shall be entitled upon the parts saved, as far as they will go, in satisfaction of his wages already earned by past services and perils." §

7. LASTLY, As to the *time* of payment.

§ By the 5 and 6 Wm. 4, c. 19, (c), it is enacted, "that the master or owner shall pay to every seaman entering into such contract as aforesaid his wages, if the same shall be demanded within the respective periods following; that is to say, if the ship shall be employed in trading coastwise, the wages shall be paid within two days after the termination of the agreement, or at the time when the seaman shall be discharged, whichever shall first happen, and in every other case the wages shall be paid at the latest within three days after the cargo shall have been delivered, or within ten days after the seaman's discharge, whichever shall first happen; in which two cases of delayed payments, the seaman shall, at the time of his discharge, be entitled to be paid on account one-fourth part of the estimated balance due to him; and if any master or owner shall neglect or refuse to make payment in the manner required, he shall for every such neglect or refusal forfeit to the

seaman the amount of two days' pay for each day, not exceeding ten days, during which payment shall, without sufficient cause, be delayed beyond the period prescribed, for the recovery of which forfeiture the seaman shall have the same remedies as he is entitled to for the recovery of the wages."

A proviso is added, that the clause is not to extend to the case of ships employed in the southern whale fishery, or on voyages for which seamen, by the terms of their agreement, are compensated by shares in the profit of the adventure. It is declared moreover, that the payment shall be valid, notwithstanding any previous assignment by the seaman of his wages, or of any attachment or incumbrances thereon, and that no assignment of wages, made prior to the earning of them, shall be valid or binding upon the party making it.

As, however, this delay may be injurious to the seaman, and deprive him of the opportunity of entering into another engagement, it is considerably provided, that if a seaman, after having been discharged three days, shall be desirous of proceeding to sea on another voyage, and in order thereto shall require immediate payment of the wages due to him, it shall be lawful for any justice of the peace, on his application, and on satisfactory proof that he would by delay be prevented from obtaining employment, to summon the master or owner before him, and require cause to be shown why immediate payment of such wages should not be made; and if no satisfactory reason shall be assigned for further delay, such justice shall order payment to be made forthwith, in default of compliance with which order, the master or owner shall forfeit the sum of five pounds (*d*).

When a seaman is left on shore at any place abroad, under a certificate of his inability from sickness to proceed on the voyage, the master is to deliver to certain functionaries or merchants (mentioned in the act) a just and true account of the wages due, and to pay the same to the seaman either in money or by a bill drawn upon the owner of his ship; and if by a bill, then such functionary or merchants are authorized and required by certificate indorsed on the bill, to testify that it is drawn according to the act, for money due on account of wages of a seaman, or to that

effect. The penalty upon the master for a refusal or neglect to give such account and to pay the amount thereof, or for giving a false account, being also twenty-five pounds (e). §

8. Policy requires that the wages of seamen should not be paid to them in foreign countries, as well to prevent desertion, as to preserve, for the benefit of their families, the money that might otherwise be spent in idleness and debauchery. The *French* Ordinance, so often quoted, has made no provision on this subject, but according to *Pothier*, the defect was supplied by subsequent ordinances in that country, which prohibited the payment of wages in places to which the ship did not belong, without the consent of the *French* consul in a foreign country, and in *France* of the officers of the classes (f). The *Code de Commerce* does not appear to contain any regulation on this subject. The ordinance of *Rotterdam* (g) having enacted, "That the full wages of the ship's company shall always be deemed to be earned, whether one or more complete voyages have been made in foreign parts, even though the ship should afterwards happen to be lost," adds, "that the master shall be obliged to pay to his people every time, if they require it, at least the half;" "but when any dispute arises, they shall not go to law in foreign parts, nor give one another any trouble, on forfeiture of what wages or monthly pay shall remain unpaid." By the articles of agreement for service in a *Dutch* ship, which were proved in evidence at the trial of an action, brought in this country by a seaman against the master for wages (h), it was stipulated, that in case one or more complete voyages should be made out of the country, the master should at every second place of delivery secure to the seamen two-thirds of their wages by an order on his purser or correspondent at *Rotterdam*; but that none of the seamen should institute any suit against the master in foreign countries. By the articles of agreement made at *Altona* for service in a *Danish* ship, which were proved in like manner at another trial (i), it was stipulated that no one should demand any money while

(e) Sect. 44.

(f) *Pothier*, *Louage des Matelots*, sect. 2, § 3.

(g) 2 *Magens*, 113, 114.

(h) *Geinar v. Meyer*, 2 *Hen. Black.* 603. In consequence of the concluding clause of these articles, it was held that the action could not be maintained, although the vessel had been seized by an

English ship, brought into this country, and sold here, under the authority of the government; the master and crew not being made prisoners. See also *Johnson v. Machielsne*, 3 *Campb.* 44.

(i) *Hulle v. Heitman*, at *Guildhall*, coram *Le Blanc, J.*, *Sit.*, p. *Mich. Term.* 1801.

abroad, from the master, but every one should content himself with the money received upon hand, until the completion of the voyage to the satisfaction of the master and his owners, and until such time as the ship should have arrived at *Altona* ; and it should at all times be at the option of the master to give them money while abroad, or not.

By the law of *America* a seaman is entitled to receive *one-third* of his wages due to him at every port, where the ship unlades, and delivers her cargo before the voyage is ended, unless the contrary is expressly stipulated in the contract (*k*).

Some cases relating to *foreign* seamen will be mentioned hereafter (*l*).

(*k*) Acts of Congress of 1790, c. 29,
s. 6.

(*l*) Post, chap. 4, s. 2, p. 588.

CHAPTER III.

OF THE LOSS AND FORFEITURE OF WAGES.

THE wages of seamen, whether hired by the month or for the voyage, are sometimes lost without any fault on their part; and sometimes forfeited by their misconduct.

FIRST, as to the *loss* of wages.

1. In order to stimulate the zeal and attention of this class of persons, who are often engaged in very perilous services, the policy of all maritime states has made the payment of their wages to depend generally on the successful termination of the voyage (*a*). If in the course of the voyage a total loss or capture of the ship takes place, the seamen lose their wages. So if the ship become disabled on the voyage. But the wages are not lost by the hypothecation of the ship, nor even by the sale of it, unless the sale be made under the authority of a competent Court; and they are preferred to the claim of the holder of an hypothecation bond (*b*). It has been already observed that they are not lost, though the ship be wrecked, if the seamen assist in saving from the wreck sufficient to pay them (*c*). Indeed, if the ship be not seaworthy at the outset, and the voyage be discontinued on that account, a seaman is not entitled to *wages*, though perhaps he may maintain a special action against the owner for the recovery of damages (*d*).

§ A distinction is also made between those accidents by which voyages may be interrupted and the interests of mariners affected, as dependent on their successful termination and other causes

(*a*) Molloy, book 2, chap. 3, sect. 10; 1 Sid. 179; *Abernethy v. Landale*, Doug. 539; French Ordin. liv. 3, tit. 4; *Des Loyers des Matelots*, art. 8; Code de Com. art. 258.

(*b*) *Sydney Cove*, Fudge, 2 Doug. Ad.

Rep. 11: *Madonna D'Idra*, Papaghira, 1 Dods. Ad. Rep. 37; *Lady Durham*, 3 Hag. Ad. Rep. 196.

(*c*) Ante, p. 566.

(*d*) By Lord Ellenborough, Ch. J., in *Eaken v. Thom*, 5 Esp. N. P. C. 6.

arising from the acts of the owners or masters, and it was held accordingly by Sir *Christopher Robinson*, in a recent case, that the condemnation of a vessel for illegal trading on the part of the master, to which the mariners were not parties, did not work a forfeiture of wages, or bar the mariners' action against the owners (e). §

It was mentioned in a preceding chapter, that the payment of wages is divisible, and that if a ship has delivered its cargo at one place, the wages are so far due, although the ship be afterwards taken or sunk. But if a ship sail to one place in order to take in a cargo there, to be conveyed to another place, and having received the cargo accordingly, be taken before its arrival at the place of delivery, nothing is payable to the seamen for navigating the ship to the first place (f).

2. I have mentioned in a former part of this Treatise (g), that in some foreign countries, where ransom is not contrary to law, the seamen belonging to a ship captured and ransomed, are bound to contribute a portion of their wages toward the ransom by way of general average. This point is in itself of no importance in this country, because ransom is prohibited by our law; but the payment of salvage upon recapture is analogous to the payment of ransom, and was so considered by Lord *Stowell* in a case in the Court of Admiralty (h). In an action brought for the wages of a seaman after a capture and ransom of the ship, and which was tried before Chief Justice *Holt*, the Chief Justice is reported to have decided that the seaman was entitled to nothing, he being unable to *prove* that by the custom of merchants he was entitled *pro rata*, as was insisted on his behalf (i). But it seems to be the better opinion, that in the case of capture and recapture, if the ship perform her voyage and earn her freight, a mariner who has not been separated from her, is entitled to his wages upon the

(e) *The Malta*, Young, 2 Hag. Ad. Rep. 158.

(f) *Hernaman v. Bawden*, 3 Burr. 1844, on a voyage to Newfoundland, for fish to be carried to Spain.

(g) Ante, part 4, c. 9, s. 14.

(h) *The Friends*, Bell, 4 Rob. Ad. Rep. 143. The prize acts do not mention the freight; they only direct a portion of the value of the ships, vessels, boats, and goods restored, to be paid as

salvage. But as the goods, if taken to the place of destination, are valued there, the freight is of course included in the valuation, and so the freighter may pay salvage upon it; in one case, an eighth of the freight was ordered to be deducted as between the owner and freighter. *The Racehorse*, White, 3 Rob. Ad. Rep. 101.

(i) *Chandler v. Meade*, mentioned at the end of the case of *Wiggins v. Ingleton*, 2 Lord Raym. 1211.

footing of the original contract (*j*), subject perhaps to a proportionate salvage. In conformity to this opinion, at the trial of a cause before Lord *Eldon*, when his Lordship presided in the Court of Common Pleas, a seaman recovered his whole wages after capture and recapture of the ship (*k*). The owners did not insist upon any deduction as contribution to the salvage, but put their defence on another ground, which they failed to establish. In another case a mariner, who had been hired for a voyage from *Newcastle* to *London* and back, at a certain sum, and was captured on board, two days after the ship's departure, and taken out and sent to *France*, instituted a suit in the Court of Admiralty for wages; the ship had been retaken, carried to the place of destination, and performed her voyage; the owner, however, had been obliged to hire another person at *London* to return to *Newcastle* with the ship, in the place of the claimant. Under these circumstances Lord *Stowell* held, that the claimant was not entitled to anything; but it seems from the language of the report, that if he had remained on board, his interest would have been thought to have revived upon the recapture (*l*).

In a case before Lord *Kenyon*, the master of a vessel, which had been seized and restored, claimed his wages for the period of detention, although during that time he had been separated from her, she having afterwards earned her freight. The wages for the voyage, exclusive of that period, were paid without dispute; and the defendant is reported to have acquiesced under a verdict given against him for the further sum, by reason of a strong opinion expressed by his Lordship at the trial in favour of the claim (*m*).

The ground of decision in this case was fully discussed and considered, on the occasion of the seizure and detention of several *British* ships in *Russia*, by the Emperor *Paul*, in the year 1800. I allude to the case of *Beale v. Thompson*, which has been incidentally mentioned before. *Beale*, an *Englishman*, was hired to serve as a seaman in a *British* ship, called the *Aquilon*, whereof *Thompson* was owner, at *monthly* wages, for a voyage

(*j*) Molloy, book 2, chap. 4, sect. 14, as to freight, which depends upon the same principle. But see the dictum of Eyre, Ch. J., in *Curling v. Long*, 1 Bos. & Pull. 637, which is contrary.

(*k*) *Bergstrom v. Mills*, 3 Esp. N. P. C. 36.

(*l*) *The Friends*, Bell, 4 Rob. Ad. Rep. 143. In this case, the learned Judge seems to consider a claim for wages, after capture and recapture, to be subject to salvage.

(*m*) *Pratt v. Cuff*, cited in *Thompson v. Rowcroft*, 4 East, 43.

from *Hull* to *Petersburgh*, and from thence to *London*; and signed articles in the usual form. The ship went out to *Petersburgh*, in ballast, to bring a cargo to *London*; and the freight was to be paid *by the ton*. On the *fifth* of *November*, 1800, which was soon after this vessel arrived at *Petersburgh*, the Emperor commanded an embargo to be laid on all *English* ships in the ports of his empire, until a supposed convention relating to the island of *Malta* should be fulfilled. To enforce this order, guards were stationed along the shore to prevent the crews from quitting their ships. On the *tenth* of the same month they were taken from their ships by a *Russian* guard; such of the seamen as were subjects of other countries were liberated at the request of their consuls; but the *British* masters and mariners were marched in parties into the interior of the country, and treated as prisoners of war. A convention hostile to *Great Britain* was formed between *Russia*, *Sweden*, and *Denmark*, and an embargo was imposed in this country on the vessels of those nations. Upon the death of *Paul*, and the succession of the Emperor *Alexander*, peace was re-established, and the ships that had been detained on both sides were mutually restored. This restitution took place in *Russia* at the end of *May*, 1801. *Beale* and the rest of the crew re-embarked on board the *Aquilon*, without entering into any new articles with the master, and returned to *London* with the ship, which brought her cargo and earned her freight. *Thompson*, the owner, paid the wages at the rate mentioned in the articles, exclusive of the time of the ship's detention; and *Beale* brought his action to recover his wages for that time. In support of the claim, it was contended that this conduct of the *Russian* government partook more of the nature of an embargo than of a capture, and that considering it as an embargo, the original contract for wages subsisted, as had been decided in the case of a contract of affreightment (*). And that the mariner's absence from the ship under these circumstances did not occasion a forfeiture by the operation of those clauses of the articles, which provide for the continuance of the seamen on board their ship, because it was involuntary on his part. On the other hand it was insisted, that this was a case of hostile seizure and temporary capture, which put an end to the original contract, and left the mariner a right proportionate only to the services he

(*) See before, part 4, chap. 12, sect. 4.

had actually performed. And further, that if it were to be considered only as an embargo, yet as the seaman had not during the period of it done any duty on board the ship, or for the benefit of the owners, he was not entitled to any payment; and it was urged, that if the force of the *Russian* government furnished an excuse to the mariner on the one hand, for not performing his contract by continuing on board the ship, so on the other hand it ought to exempt the owner from paying for what he had not received. The learned Judges of the Court of Common Pleas were divided in opinion as to the character to be attributed to these acts of the *Russian* government, upon which the determination of the question between the parties was thought principally to depend (*o*). The cause was brought before the Court of King's Bench by writ of error, and after consideration, the judgment of the Court was delivered by Lord *Ellenborough*, in favour of the claim of *Beale*, the mariner. It is impossible to give the full effect of the very learned judgment pronounced by the Chief Justice in an abstract, nor does the plan of this Treatise allow me to transcribe the whole, I must, therefore, refer the reader, who is desirous of full information, to the report (*p*), and content myself with stating, that the Court thought it unnecessary to decide in this case, whether or no the dissolution of contracts for freight and wages is the necessary effect of perfect and complete capture, where the right of the original proprietor is not revested by subsequent recapture, nor recognized as continuing in force by any judgment or authoritative act of restitution on the part of the capturing nation; considering this as a case of hostile seizure, with a view to measures of retaliation, if they should ultimately be thought just and necessary, but of subsequent restitution and abandonment of the right of seizure, on the part of the power by which the seizure had been made; and observing that there was no case where property so dealt with had been considered as captured, of the contract for freight or wages dissolved: and holding, therefore, that the plaintiff's claim was not defeated on the supposed ground of a dissolution of the contract. The Court also thought, that the seaman had not in this case forfeited his wages under any of the clauses of the articles, because the language of the articles construed, as it ought to be, with reference to the Acts of Parliament, imported

(*o*) *Beale v. Thompson*, 3 Bos. & Pull. 405.

(*p*) *Beale v. Thompson*, 4 East, 546.

a departure from the ship by the unauthorized act of the party, and did not apply to a seaman taken out of his ship in the manner in which the plaintiff and the rest of the crew had been in this case; but that if this point were more questionable than it appeared to be, yet that the return of the plaintiff to the ship in the manner stated, did, in the absence of any fresh contract on the subject, import a recognition on the part of the master, that he and the sailors then stood in their original relative situation to each other, under the articles, by which that relation was constituted. And upon the whole the Court thought "in point of law, that the contract of service, between the plaintiff and defendant, was to be considered as having continued and been in force from the time of executing the articles, up to and at the period of the ship's arrival at her port of discharge, and the final termination of her voyage there; and that the plaintiff was to be considered as entitled to his wages during the same time."

This case was afterwards brought by writ of error before the House of Lords, when the opinion of the Judges was taken on the question, whether, on the whole of the facts found in the special verdict, the original plaintiff was entitled to recover wages during the time he was kept out of the ship, as found in the special verdict. The Judges were unanimously of opinion that he was so entitled to recover; and the Lord Chancellor concurred in their opinion (q).

It has been observed, that *Beale* the plaintiff in the case just quoted, was an *Englishman*; an action was also brought by a mariner, belonging to another ship, under circumstances the same in all respects, except as to his national character, he being a *foreigner*. In this action also the decision of the Court was the same (r).

SECONDLY, as to the *forfeiture* of wages.

3. Desertion from the ship is held to be a forfeiture of the wages previously earned in all maritime states (s). And in conformity to this principle of maritime law, the legislature of this country, in the reign of King *William the Third*, "for the prevention of seamen deserting of merchants ships abroad in parts

(q) *Thompson*, plaintiff in error, *Beale*, defendant in error, 1st Dow. 299.

(r) *Johnson v. Broderick*, 4 East, 566.

(s) See on this subject of desertion,

Ordin. of Wisbuy, art. 61; of the Hanse Towns, art. 43; Molloy, book 2, chap. 3, sect. 10; French Ordin. liv. 2, tit. 7; Des Matelots, art. 3.

beyond the seas," enacted, "That all *such* seamen, officers, or sailors, who shall desert the ships or vessels, wherein they are hired to serve for that voyage, shall for such offence forfeit all such wages as shall be then due to him or them" (*t*). By the 2 Geo. 2, c. 36, it was enacted, that if a seaman should desert, or refuse to proceed on the voyage on board any ship bound to parts beyond the seas, or should desert from the ship to which he belonged, *in parts beyond the seas*, after he should have signed the contract, he should forfeit to the owners the wages due to him at the time of his deserting or refusing to proceed on the voyage (*u*).

§ And now, by 5 & 6 Wm. 4, c. 19, if any seaman, after having signed the ship's articles, or after the ship has left her first port of clearance, wilfully and without leave absent himself from the ship or his duty, he forfeits (in all cases not of absolute desertion, or not treated as such by the master) out of his wages to the master or owner the amount of two days' pay for every twenty-four hours of absence, and in a like proportion for any less period of time, or at the option of the master the amount of such expenses as have been necessarily incurred in hiring a substitute to perform his work (*v*); and if any seaman, without sufficient cause, neglects to perform such duty as shall reasonably be required of him by the master or other person in command of the ship, he is subject to a like forfeiture in respect of every offence and of every twenty-four hours continuance of it (*w*). If after the ship's arrival at her port of delivery, and before her cargo is discharged, any seaman quits the ship without a previous discharge or leave from the master, he forfeits to the master or owner one month's pay of his wages (*x*); but no such forfeiture is incurred unless the fact of such seaman's temporary absence, neglect of duty, or quitting the ship, be duly entered or recorded in the ship's log-book, and this entry must specify truly the hour of the day at which it occurred, and the period during which the seaman was absent or neglected his duty, the truth of which entry it shall be incumbent on the owner or master, in all cases of dispute, to substantiate by the evidence of the mate, or some other credible witness (*y*).

If a seaman absolutely desert the ship he forfeits to the owner

(*t*) 11 & 12 Wm. 3, c. 7, s. 17.

(*u*) 2 Geo. 2, c. 36, s. 3.

(*v*) Sect. 7.

(*w*) Sect. 7.

(*x*) Sect. 7.

(*y*) Sect. 7.

or master all wages and emoluments to which he might otherwise have been entitled, and also the clothes and effects he may have left on board, provided the circumstances attending such desertion be entered in the log-book at the time, and certified by the signature of the master, mate, or other credible witness; and the absence of a seaman from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship without permission of the master, or for any period, however short, under circumstances plainly showing an intention not to return, is to be deemed an absolute desertion. If in consequence of such desertion beyond the seas the master be obliged to employ a substitute at a higher rate of wages, he is entitled to recover from the deserter in the same way as wages are by the act made recoverable, the excess of wages so paid by him to such substitute beyond the amount which would have been payable to the deserter in case he had duly performed his service pursuant to the agreement (z).

On these sections it has been determined by the Court of Exchequer that the *ninth* applies to the case of the desertion of a ship whilst in foreign parts, and before her arrival at her port of delivery; the *seventh* to the quitting of a ship after her arrival in her port of delivery, but before the discharge of her cargo; and that where a seaman who had signed the articles prescribed by the statute absolutely quitted the ship without any *animus revertendi* after her arrival and being moored at her port of delivery, but before her cargo had been discharged, did not thereby incur a total forfeiture of his wages, but only of a month's wages (a).

A mode of ascertaining the amount of these forfeitures, where the seaman has contracted for the voyage or the run, is expressly provided by the act (b). §

If a mariner quit the ship with leave of the master, and when ordered to return refuse to do so, his wages are forfeited (c). But they are not forfeited by his quitting the ship, and refusing to proceed in her on a voyage not designated by the articles (d). And if in the Court of Admiralty the owners allege desertion as a

(z) 5 & 6 Wm. 4, c. 19, s. 9.

(a) McDonald v. Jopling, 4 M. & W. 285.

(b) Sect. 8. See the act in the Appendix.

(c) Bulmer, Brown, 1 Hag. Ad. Rep. 163; Jupiter, Crosbie, 3 Hag. 221.

(d) Eliza, Ireland, id. p. 182; Countess of Harcourt, Bunn, id. p. 248; Cambridge, Barber, 2 Hag. Ad. Rep. 243.

defence to a suit for wages, it is incumbent on them to shew the articles or contract, in order that the stipulated service may appear (e).

In the case of certain mariners hired in the *Downs*, for a voyage or run to the port of *Hull* at *twelve* guineas each, who with the consent of the master, but against the positive orders of the owners, quitted the ship on the day after her arrival in the roadstead of that port, in the river *Humber*, the port being so full that the vessel could not enter immediately; the present learned Judge of the Court of Admiralty decreed that the mariners had forfeited their wages. The ship actually entered the port within a week: it did not appear that at the time of the desertion there was any prospect of a *lasting* impediment; and the learned Judge, without determining how long mariners were bound to wait in such a case, held, that they could not be entitled to their dismissal, "till after some time of just expectation of the removal of the difficulty" (f).

Certain articles of agreement for service in a *privateer* contained in the body a clause imposing the penalty of forfeiture of wages for twenty-four hours' absence without leave; and in addition thereto contained also the following memorandum written in the margin, viz.: "to leave at the end of three months, if the ship is in port or in perfect safety, of which the captain is to be the sole judge." The ship belonged to the port of *London*. The captain's cook, who had signed these articles, brought an action against the master for his wages; and at the trial it appeared that the plaintiff had served ten months, and on his return from a cruise, while the ship was in *Yarmouth* roads, and the master was on shore, he asked leave of the mate to go on shore to see his wife, but was told by the mate that he could not say whether he might have leave or not; the plaintiff, however, went on shore, and did not afterwards join the ship: *Yarmouth* roads are rather a dangerous place; the crew had originally consisted of twenty mariners; twelve were sufficient to navigate the ship to *London*; and the boatswain, quarter-master, and two lieutenants had been previously discharged. The learned Judge (Mr. Justice *Chambre*) before whom the cause was tried, told the jury that under such a clause he did not think the master could refuse leave without a

(e) *Bulmer, Brown*, 1 Hag. Ad. Rep. 168; 4 & 5 Wm. 4, c. 19, s. 16.

(f) *The Pearl, Denton*, 5 Rob. Ad. Rep. 224.

sufficient reason, and left it to them to consider whether the ship was in a place of safety when the plaintiff quitted. The jury found a verdict for the plaintiff, and the Court of Common Pleas afterwards approved of the direction of the learned Judge, and the verdict was established (g). This being the case of a private ship of war, and not of a merchant vessel, the forfeiture depended upon the particular contract of the parties, and not upon any legislative enactment.

By the 2 Geo. 2, c. 36, reciting that "seamen and mariners after their ship's arrival at their unlivering port in Great Britain oftentimes leave the ships and vessels before they are unladen, or before the said seamen and mariners are discharged by the masters or commanders of such ships or vessels," it was enacted, "that in case any seaman or mariner, not entering into the service of his Majesty, his heirs and successors, should leave such ship or vessel to which he or they belonged, before he or they should have a discharge in writing from the master or commander, or other person having the charge of such ship or vessel, he or they so leaving such ship or vessel should forfeit *one month's pay*" to the use of *Greenwich Hospital* (h). Although by this clause the discharge was required to be in writing, yet in an action brought by a seaman against the master for his wages, at the trial whereof it appeared that the plaintiff and several others left the ship under these circumstances, while she was under the command of the mate, and the master insisted upon his right to make this deduction, but did not call the mate to prove that he had not given a discharge in writing; it was held that the jury might presume that the plaintiff had received such a discharge; this being the case of a penalty, in which the negative ought to be proved by the party insisting on the forfeiture, as the circumstances of the case appeared to afford him the means of doing so (i). It is to be observed, that in this case the defence at the trial was grounded on the particular enactment of the statute.

The same statute authorized the master or owner to deduct from

(g) *Neave v. Pratt*, 2 B. & P. New Rep. 408.

(h) 2 Geo. 2, c. 36, s. 6. By the 5 & 6 Wm. 4, c. 19, s. 53, all forfeitures for which no specific application is provided, shall be paid and applied as follows:—one moiety to the informer, and

the other to be divided between Greenwich Hospital and the Merchant Seamen's Hospital at the ship's home, and if there be none, to Greenwich Hospital.

(i) *Frontine v. Frost*, 3 Bos. & Pull. 302.

the wages due to a mariner, all the penalties and forfeitures incurred by the act, and to enter them in a book to be kept for that purpose, to be signed by the master and two or more principal officers (*j*); and it was held that the master could not make this deduction, unless the forfeiture had been regularly entered into a book as the statute directed (*k*).

I have already mentioned that entry into the service of his Majesty, is *not* deemed a desertion, nor followed by the forfeiture of wages (*l*). But where a mariner quitted a vessel in defiance of the master, with opprobrious language—and *without any declaration of such intention* when he quitted the vessel, entered on board a King's ship within twenty-four hours, it was held to be a desertion, working a forfeiture of wages (*m*).

A forfeiture in this case may be waived by the party entitled to take advantage of it. And accordingly, in the case of a foreign seaman, by whose articles it was provided, "that if any of the crew should absent themselves before the ship was unloaded, without the master's leave, they should forfeit the whole of their wages," and who quitted the ship without leave in the port of *London*, before she was unloaded, and was absent a day and a night, but who afterwards returned to the ship, and was received by the master, and worked in discharging the cargo in the same way as the other mariners, it was held that the master could not set up this absence as a defence to an action brought by the seaman for his wages (*n*). But a forfeiture is not waived by the acceptance of a seaman's services whilst the ship is in distress, unless such acceptance be continued when the necessity for them has ceased (*o*). On the other hand, it cannot be insisted on, if the seaman's breach of duty be occasioned by the master's misconduct (*p*).

4. It is, however, of great importance to understand that the forfeiture of wages for desertion does not arise out of these provisions of the legislature, but depends, as I have already intimated, upon a general rule and maxim of maritime law. This point has been most ably discussed and enforced in a judgment pronounced by the learned Judge of the Court of Admiralty, which, notwithstanding the decision above cited (*q*), on the construction of the 5 & 6 Wm. 4, c. 19, deserves to be quoted at length as a most excellent

(*j*) 2 Geo. 2, c. 36, s. 9.

(*k*) *Frogsine v. Frost*, 3 Bos. & Pull. 302. See post, p. 583.

(*l*) Chap. 2 of this part, sect. 2, by the statute there cited.

(*m*) *The Amphitrite*, Morgan, 2 Hag. Ad. Rep. 403.

(*n*) *Miller v. Brant*, 2 Campb. 590, and 5 & 6 Wm. 4, c. 10, s. 7.

(*o*) *Train v. Bennett*, 3 C. & P. 3.

(*p*) *Ib.*

(*q*) *McDonald v. Jopling*, 4 M. & W. 285; ante, p. 578.

illustration of general principles. A *West India* ship having returned with a cargo to the river *Thames*, was lashed to another vessel in the port of *London*, a little below *Blackwall*, preparatory to her entrance into the *West India Dock*, for the discharge of her cargo, being the only place at which it could lawfully be discharged. In this situation the carpenter quitted the ship without the permission of the mate, who was left on board in the command, and probably with a knowledge that permission had been actually refused. It appears that several others of the crew left the ship in the same situation; and the owners were obliged to procure other assistance to work the vessel into the dock. The carpenter instituted a suit for his wages, and it was contended on his behalf, that if any penalty at all was incurred, it was only a forfeiture of one month's pay to *Greenwich Hospital*, under the statute 2 Geo. 2, c. 36, s. 6. On the other hand, the owners insisted that the entire right to wages was forfeited and gone by this desertion: and the learned Judge so decreed, and made the following remarks upon the law in such cases: "The question then is as to the *penalty*: if the word *penalty* is that which properly belongs to this act of misconduct. That such a demand as this, for entire wages, under such conduct on the part of those who claim them, could have been at any time supported, is inconceivable: if owners are damnified by the misconduct of their mariners, they are entitled upon every principle of reason and justice to a set-off against the demand of wages, on account of the hazards to which their property had been exposed by the non-performance of the contract. By interpretation of law, the voyage is not completed by the mere fact of arrival: the act of mooring is an act to be done by the crew, and their duty extends to the time of the unlivery of the cargo (*o*). There is no period at which the cargo is more exposed to hazard than when it is in the act of being transferred from the ship to the shore, and therefore the law, not only the old law, but particularly the statute by which the *West India* trade has been in latter times regulated, has enjoined in the strictest manner, that the mariners shall stay by the vessel until the cargo be actually delivered. I take this to have been always a part of the duty of the mariners, their contract is legally understood to go this length, and there never can have been a time when the owner was not entitled to some compensation against the mariners, on account of the non-completion of the contract. This is a consideration not in *modum pœnæ*, but it is a civil compensation for injury received, existing in all reason and justice antecedently to any statute upon the subject. In the case

(*n*) The Cambridge, Barber, 2 Hag. Ad. Rep. 243.

of freight, if a master does not execute any part of the contract, it is in strict principle a forfeiture of the whole freight, and so it would be in these cases of wages, though the law has not usually been carried to its full extent; but from that indulgence with which it has always contemplated the interests, and even the errors and failures of this class of men, it has wrought only the forfeiture of a part of the wages by way of compensation to the owner for the trouble and risk of the exposure of his property, and for his additional expense in procuring other assistance to effect that which ought to have been effected by such deserters. Then came the statute of merchant seamen, which contained a clause, giving one month's wages to *Greenwich Hospital* in cases of desertion, and in the argument which has been founded, I presume upon the case alluded to, it is urged as if it was understood to transfer a part of the forfeited wages to that institution. But surely it never could be the intention of the legislature to make that a matter of charity to *Greenwich Hospital* which was already a matter of justice due to the injured owner. It would be a strange remedy to hold out to the merchant owner, who was defrauded of the service of his mariners by their desertion, and who had his equitable right of deducting from their wages on that account, to inform him that now he should no longer have his right of set-off against these delinquents, but that the wages should go as a forfeiture to *Greenwich Hospital*. That would be to double his injury. The case of *Frontine & Frost* produced a great deal of deliberation among the Judges of the Court in which it was considered; and it was there laid down pretty strongly in the argument of counsel, that the delinquent does not forfeit the whole of his wages, which is true. But it was further argued that the master must have debited himself to *Greenwich Hospital* in order to entitle himself to make the deduction, on the ground that the deduction is for the benefit of that charity, and not for the compensation of the owner. Now I take the interpretation of the case to be this; that it will not entitle the owner to set-off the forfeiture to *Greenwich Hospital* as a forfeiture under the statute, which he had done in his pleadings, unless he shall have complied with the requisitions of the statute, not that he shall lose his own right of deducting a compensation due to himself personally on account of the imperfect execution of the contract. I have had opportunities of conversing with very learned persons, who were interested in that judgment, and from whom I understand that the authority of their

opinions concurs in sustaining the proposition, that the owner is not debarred by the provisions of the statute from those rights to which he was entitled under the old law. The legislature never could have intended to deprive the owner of his remedy, when it superadded this forfeiture in favour of the hospital, which was to be obtained in the modes it has prescribed. This case does not, I think, in any manner interfere with the principle which I have laid down, that the owner is at liberty to set-off the compensation to which he is entitled against a demand for wages independently of that statute. But the present case goes a great deal further; it is true the vessel had arrived in the river, but the voyage was not finished, it was still to be prosecuted. The acts which have passed having made the *West India Docks* the only place where these cargoes can be discharged, the voyage can only terminate there; the vessel has not, till then, arrived at her final moorings. Her port is not the port of *London* generally, but that particular portion of it which is expressly and exclusively appropriated for the reception of *West India* ships. 'It is therefore a desertion during the voyage, which by the old law, as well as by the statute, works a forfeiture of the whole wages; and it is a case of a very flagrant nature' (p).

5. The legislature has also punished with the forfeiture of wages the offence of neglecting or refusing to assist the master in defending the ship against the attack of pirates (q). It seems also that neglect of duty, disobedience of orders, habitual drunkenness, or any cause which will justify a master in discharging a seaman during the voyage, will also deprive the seaman of his wages (r). But a single act (s), or even occasional acts of intemperance will not have that effect (t).

6. If the cargo be embezzled or injured by the fraud or negligence of the seamen, so that the merchant has a right to claim a satisfaction from the master and owners, they may, by the custom of merchants deduct the value thereof from the wages of the sea-

(p) *The Baltic Merchant*, Smith, 1 Edw. Ad. Rep. 86. But see on the construction of the act now in force. *McDonald v. Jopling*, 4 M. & W. 285; ante, p. 578.

(q) 22 & 23 Car. 2, c. 11, s. 7.

(r) See the judgment pronounced by Sir William Scott, in the case of *Robinet*

v. the ship Exeter, 2 Rob. Ad. Rep. 261.

(s) *The Martha*, Young, 2 Hag. Ad. Rep. 158; *the Ealing Grove*, Falconer, 2 Hag. Ad. Rep. 15; *the Gondolier*, Rhodes, 3 Hag. Ad. Rep. 190.

(t) *Lady Campbell*, Beetham, 2 Hag. Ad. Rep. 5.

men by whose misconduct the injury has taken place (*u*). And the last proviso introduced into the usual agreement (*v*) signed by the seamen, is calculated to enforce this rule in the case of embezzlement either of the cargo, or of the ship's stores. This proviso is to be construed individually, as affecting only the particular persons guilty of the embezzlement, and not the whole crew (*w*). Nor, as it seems, is any innocent person liable to contribute a portion of his wages to make good the loss occasioned by the misconduct of others (*x*).

(*u*) Molloy, book 2, chap. 3, sect. 9 ;
2 Show. 167 ; 1 Lord Raym. 650.

(*v*) See Appendix. Schedule to the
act, 5 & 6 Wm. 4, c. 19.

(*w*) Thompson v. Collins, 1 Bos. &
Pull. N. R. 347. Prince Frederick, Hart,
2 Hag. A. R. 394.

(*x*) The same cases.

CHAPTER IV.

OF PROCEEDINGS TO OBTAIN THE PAYMENT OF WAGES.

HAVING, in the three preceding chapters, considered the contract for service on board a merchant ship ; the cases in which the remuneration of such service is due, either wholly or in part ; and those in which it is lost or forfeited ; I propose in this last chapter to treat of the means of obtaining this remuneration by legal process.

1. According to the observation made in a former part of this Treatise (a), the jurisdiction of the Courts of Common Law can in this case be exercised only by suit against the person ; but the jurisdiction of the Court of Admiralty may be exercised by process against the ship, or the proceeds of a sale thereof remaining in the Court. In this Court alone, therefore, that principle of the maritime law, which holds the ship in specie to be subject to the claim of wages earned by service in it, can be carried into effect. The Court of Admiralty was originally constituted for the adjudication of causes and disputes arising upon the high sea, and within the jurisdiction of the Lord High Admiral, whose deputy the judge of that Court formerly was. The proceedings therein, being according to the course of the Civil Law, appear to have been very unpopular in ancient times ; and two statutes were made in the reign of King *Richard the Second*, upon the complaint of the Commons of *England*, to define the limits of its jurisdiction ; by the first of which it is " accorded and assented, that the admirals and their deputies shall not meddle from henceforth of any thing done within the realm, but only of a thing done upon the sea, as it hath been used in the time of the noble prince King *Edward*, grandfather of our Lord the King that now is" (b). By the other, " It is declared, ordained, and established, that of

(a) Part 2, chap. 3.

(b) 13 Rich. 2, stat. 1, c. 5.

all manner of contracts, pleas, and quarrels, and all other things arising within the bodies of counties, as well by land as by water, and also of wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction" (c). Considering these statutes with reference to the present subject, it is evident that, if the seaman's claim to wages be in reality founded on the performance of his service in the navigation of a ship on the high sea, the Court of Admiralty must have cognizance of the claim; and, on the other hand, that if the claim be in reality founded on the contract made for performance of such service, and such contract be, as it usually is, made on shore, or in a port or river, within the body of a county, the Court of Admiralty can have no cognizance of it. In this view of the subject, it is difficult to distinguish the case of the master from that of the persons employed under his command; the nature and place of the service, and the place of the hiring, are in both cases usually the same. Nevertheless, a distinction has long been made between them, and is now become a settled rule of law. In pursuance of this distinction, the seamen have now in ordinary cases a threefold remedy: against the ship, the owners, and the master. The master, whether appointed to that office at the commencement (d), or having succeeded to it in the course (e) of the voyage, can only sue the owners personally in a Court of Common Law. But as he generally receives the freight and earnings of the ship, and may pay himself out of the money in his hands, he has not often occasion for the aid of a court of justice to obtain his right. The suit of the seamen in the Court of Admiralty is frequently spoken of as an excepted case (f), and an indulgence granted to them on account of the convenience and advantage of proceeding in a Court in which all may join in one suit, and payment may be obtained out of the value of the ship; and of the presumption that they who contract with the master, contract with him on the credit of the ship; whereas the master, who contracts with the owners, is presumed to trust to their personal credit.

(c) 15 Rich. 2, c. 3.

(d) *Rogg v. King*, 2 Stra. 858; 1 Bern. 297, and *King v. Player*, there cited. *Clay v. Sudgrave, or Snellgrave*, Salk. 33; 1 Lord Raym. 576; 12 Mod. 405; Carth. 518.

(e) *Read v. Chapman*, 2 Stra. 937; *the Favorite, De Jersey*, 2 Rob. Ad. 232.

(f) In the cases cited in the two last notes.

2. The clear result of the several decisions (*g*) upon this subject is, that if the hiring be on the usual terms, and made by word, or by writing only, and not by deed, the seamen, or any one or more of them, and every officer, except the master, may sue in the Court of Admiralty; and may, by the process of that Court, arrest the ship as a security for their demand, or cite the master or owners personally to answer to them. In a suit against the owners, the master is a competent witness on their behalf (*h*).

And the seamen may sue there not only for the wages earned in the course of a voyage, but for those earned in rigging and fitting out a ship for a voyage, on which they have engaged to proceed, if the owners do not afterwards think proper to send the ship on the intended voyage (*i*). And it seems also that they may sue there for the wages contracted to be paid to them for navigating a ship from one port of this country to another (*k*). And if a suit be there instituted, that Court can properly decide whether a place at which a ship may have arrived be a port of delivery so as to entitle them to wages (*l*). Indeed, if the master has obtained a sentence in the Court of Admiralty upon the usual allegation, stating that he was hired within the jurisdiction of that Court, the Courts at *Westminster Hall* will not prohibit the execution of the sentence (*m*).

In regard to *foreign* seamen, the Court of Admiralty has been in the habit of entertaining proceedings against ships in the ports of this country, at *their* suit, for wages as due by the general maritime law, with the consent of the accredited agent of the government of their country. But the learned judge of that Court refused to proceed in the suit of an *American* seaman, whose claim was founded, not on any such rule of law, or any custom of his country, but merely on a particular article in an alleged act of

(*g*) As to the seamen, after sentence, *Winch*, 8; before sentence, *Alleson v. Mursh*, 2 Vent. 181; *Anon.* 3 Mod. 379; *Bens v. Parre*, 2 Lord Raym. 1206; the *Boatswain*, *King v. Ragg*, 2 Stra. 858; 1 Barn. 297; the *Carpenter*, *Wheeler v. Thomson*, 1 Stra. 707; the *Surgeon*, *Sayer*, 136; the *Mate*, *Bayley v. Grant*, 1 Lord Raym. 632; *Salk*, 33; *Read v. Chapman*, 2 Stra. 937.

(*h*) *The Lady Ann*, *Wardell*, 1

Edw. 235.

(*i*) *Wells v. Osman*, 2 Lord Raym. 1044; 5 Mod. 238. See also *Mills and Another v. Gregory*, *Sayer*, 127.

(*k*) *Anon.* 1 Vent. 343. The application for a prohibition was after sentence. See 31 Geo. 3, c. 39, s. 6.

(*l*) *Brown v. Benn and Others*, 2 Lord Raym. 1247.

(*m*) *Barber and Another v. Wharton*, 2 Lord Raym.

Congress, which was not incorporated into the ship's articles (*n*). In the case of a *Greek* vessel which had been sold in this country, under a decree of the Court, in a suit instituted by the holder of a bottomry bond, the same judge ordered the charge of the subsistence of the *Greek* seamen to be paid out of the proceeds. It was proved, that by the customary regulations of *Turkey*, the master is to take back the men in his own vessel, or provide conveyance for them in another; and if the vessel be sold, the proceeds are liable to their support, and to procure them the means of conveyance to their own country. The seamen had, in fact, been subsisted and sent home by the *British* government, and the king's proctor intervened in the suit. The learned judge adverted to this proof, but also said that he considered subsistence to be a part of the compensation for the services of a mariner, and so in effect a part of his wages. It does not appear by the report whether any expense had been incurred in sending back the men beyond that of their subsistence, or whether any other expense was decreed or claimed (*o*). And in the case of a *Dutch* ship which put into the *Isle of Wight* in great distress, and was there abandoned by the owners to the discretion of the master, and assigned to *British* creditors, the same learned judge considered the owners as having disclaimed the articles of agreement with the mariners, which contained a clause against suits in a foreign country, and the contract with them to be determined, and that their suit was the arrest of a *British* ship, and their claim sustainable on the general law (*p*). In the case also of an *American* ship, which had sailed from *New York* under an engagement with the mariners for a voyage to *Gottenburgh* and back, but which, in fact, sailed to *Petersburgh*, and after delivering her cargo there, took a cargo for *London* under a *British* license, which was in contravention of the law of *America*, the seamen were allowed to recover their wages: the character of alien enemy was, for the purpose of this voyage, removed by the *British* license, as far as respected a proceeding of this nature in a *British* Court; and the learned judge thought the seamen would be without remedy if the Court refused its assistance (*q*).

(*n*) The Courtney, English, 1 Edw. 239.

(*o*) *Madonna D'Ibra*, Papaghica, 1 Dods. Ad. Rep. 37.

(*p*) Wilhelm Frederick, Noorman, 1 Hag. Ad. Rep. 138.

(*q*) *Maria Theresa*, Phillips, 1 Dods. Ad. Rep. 303.

3. I have said that seamen may sue in the Court of Admiralty, if the contract is made on the usual terms, and not by deed. It was decided in two causes, before the passing of the earliest statute requiring the contract to be in writing, that the Court of Admiralty had jurisdiction in the case of a written contract (*r*). And the 5 & 6 Wm. 4, c. 19, contains a clause, enacting that no seaman shall, by entering into or signing such agreement, be deprived of any means for the recovery of wages against any ship, the master, or owners, which he might then lawfully make use of. The case of special agreements, and of contracts under seal, requires further explanation. The contract, whatever be its form or nature, always remains in the possession of the master or owners. The statute expressly ordains, that where it becomes necessary to produce the contract in Court, no obligation shall lie on the seamen to produce it, but on the master or owners of the ship, and that no seaman shall fail in any suit or process for the recovery of wages for want of the production of it (*s*). In the common form of proceeding in the Court of Admiralty, the party who sues for wages does not state how the contract was made; the foundation of the suit in that Court is the service, and not the hiring; and therefore the objection that the hiring was upon special terms, or was made by deed, does not appear upon the face of the complainant's proceedings, but must be made by the defendants, if they wish to rely on it. And they must make their objection, and apply to one of the Courts at *Westminster* Hall for a prohibition, *before* sentence is given in the Court of Admiralty: if they suffer the cause to proceed to a judgment upon the merits in that Court, they cannot afterwards avail themselves of this objection (*t*). If the contract for service be made upon terms and conditions differing from the general rules of law, the service alone cannot entitle a seaman to his wages: his right to them must depend upon the performance of the stipulated terms. The construction of the instrument, in which those terms are contained, is a proper subject for the jurisdiction of the Courts of Common Law; and it is

(*r*) *Bens v. Parre*, Mich. Term, 4 Anne, 2 Lord Raym. 1206, and the *Mariners' Case*, 8 Mod. 379.

(*s*) 5 & 6 Wm. 4, c. 19, s. 16. And a seaman plaintiff need not give notice to the defendant to produce the articles at the trial. If the defendant wishes to take advantage of any clause contained in

them, he himself must produce them. *Bowman v. Manzelman*, 2 Campb. 315.

(*t*) *Buggin v. Bennett*, 4 Burr. 2035. If a party, who has pleaded a *modus* to a suit in the Spiritual Court for tithes, suffer the *modus* to be tried in that Court, he cannot obtain a prohibition after sentence. *Full v. Hutchins*, Cowp. 422.

clear, by the several authorities on this subject, notwithstanding a seeming dictum in one case (*u*) to the contrary, that upon the suggestion of such a contract made at land and under seal, supported by the proper affidavits, the Courts at *Westminster Hall* will prohibit the Court of Admiralty from proceeding in a suit instituted there (*v*).

4. But it is not quite clear whether the defendants ought, before they apply for a prohibition, to plead the agreement in the Court of Admiralty as a bar to the jurisdiction of that Court. In one of the cases on this subject, the Court of King's Bench is reported to have said, "If there is any special contract, as is now suggested, the defendant may plead it in the Court of Admiralty; and if that Court does not allow the plea, then it may be a proper time to move the King's Bench for a prohibition; for if it should be granted before the plea is disallowed it is a prejudging of the justice of that Court" (*w*).

5. The course of the proceedings that had taken place in the Court of Admiralty, does not appear by the report of any of the cases in which a prohibition has been granted. The best reporter of the first of these cases (*x*) says only, "A motion was made for a prohibition to the Court of Admiralty, in a suit there for mariners' wages, upon a suggestion of a contract made for them at land; and the Court held, that for the convenience of seamen the Admiralty had been allowed to hold plea for mariners' wages, but yet with this limitation, that if there be any special agreement, by which the mariners are to receive their wages in any other manner than is usual, or if the agreement be under seal, so as to be more than a parol agreement, in such a case a prohibition shall be granted; and so it was granted in this case."

In the second cause (*y*), by the suggestion (*z*) made in support of the motion for a prohibition, the defendant in the Court of Ad-

(*u*) *Bens v. Parre*, 2 Lord Raym. 1206.

(*v*) See the cases cited in 2 Dods. Ad. Rep. 12, in support of the doctrine, that the Court of Admiralty has no jurisdiction in special contracts.

(*w*) *The Mariners' Case*, 8 Mod. 379, Trin. Term, 11 Geo. 3.

(*x*) *Opy v. Child and Others*, Easter Term, 5 Wm. & Mary, K. B. Salk. 31, S. C., by the name of *Opy v. Addison* and

Others, 12 Mod. 38, but not more circumstantial.

(*y*) *Day v. Serle*, K. B. Easter Term, 7 Geo. 2, very shortly mentioned by *Strange*, vol. 2, p. 961, more fully by *Barnardiston*, vol. 2, p. 419; but the account in the text of the judgment pronounced by Lord Hardwicke is taken from a manuscript note.

(*z*) MS. It is signed by Draper.

miralty, after reciting the statutes relating to the jurisdiction of the Court of Admiralty, and the libel exhibited in that Court by the seamen (by which it appeared that they had during the voyage entered on board one of his Majesty's ships) set forth the contract, which contained an express covenant, that if any or either of the seamen should depart from or leave the ship during the voyage, to go on board any of his Majesty's ship or ships of war, or upon any other pretence or account whatsoever, without leave of the master, such seaman so deserting or leaving the ship should forfeit and lose all his wages and pay then due and owing; and averred that this contract was made on land in this country, and sealed and delivered by the parties, and that although he had offered to prove the said statutes and the rest of the premises in the Court of Admiralty before the Judge there, yet that the Judge of the said Court had altogether refused to receive the said plea and allegation. Upon the motion for a prohibition, the Chief Justice (Lord *Hardwicke*) said, that before the making of the new statute (viz. the 2d Geo. 2, c. 36,) he always understood the law to be settled, that, as the Admiralty Court proceeds in suits for mariners' wages upõn contracts made at land, which cannot be the proper cognizance of the maritime jurisdiction, merely by indulgence, a prohibition would always be granted where the contract differed from the common and usual contracts between masters of ships and seamen about wages, by reason of some special terms contained in it; and that in this agreement there seemed to be some special covenants, as, for example, one, that if the mariners should enter into any of his Majesty's ships of war, they should forfeit their wages; which was directly contrary to a clause in the late act. And secondly, that where the agreement was by writing signed and sealed, there also a prohibition should go, which was likewise the present case. And the only question, therefore, remaining was, whether or no the statute reached to this case. And his Lordship gave his opinion that it did not; since as this was a contract by deed, it was *dehors* the act, which only required a contract in writing: and it could not be supposed that the act intended to give the Court of Admiralty the cognizance of agreements for mariners' wages made by deed; that must depend upon the trial of the validity of such deed, which could not be otherwise than by a jury at common law, being left as it was before; that this case came within the case of *Opy and Addison*, and as the late statute did not take it out of the old rule,

it must still go by that rule. The other Judges concurred in the same opinion ; and a prohibition was granted.

The report of the last case on this subject, which was a suit instituted in the Court of Admiralty by seamen employed on board a ship in the service of the *East India Company*, is given at considerable length, and although the particulars of the deed, under which the seamen were hired, are not stated, it may be collected from the report that the deed contained a clause, by which it was stipulated that the seamen should not be entitled to wages unless the ship should return home ; but it does not appear whether this event had taken place or not. The Court granted a prohibition upon the authority of the two former cases, and Lord *Mansfield* took notice that the seal was not the only circumstance in which this case differed from the ordinary contract for mariners' wages (c).

6. From this view of the decisions of the Courts at *Westminster Hall*, it appears that a prohibition has not in any instance been actually granted where a contract was upon the ordinary terms, merely because it was made by deed ; but that in each of the cases the Court considered that circumstance alone to be a sufficient ground for a prohibition. For which the reason seems to be, that as the suit of the seamen in the Court of Admiralty was at first allowed only as a matter of indulgence, and considered as an excepted case not properly belonging to the jurisdiction of that Court, the exception was confined to the case of ordinary contracts, not made under seal. For if a contract under seal contain such clauses and covenants only, as are conformable to the general rules, which govern the administration of justice in the Court of Admiralty, neither the actual existence, nor the legal effect and import of the deed, can become the subject of litigation in that Court. The seamen are not bound to make the deed the foundation of their claim, either by the general course of proceedings in the Court of Admiralty, or by the statute ; and as it can never be their interest to deny the existence or execution of a deed pleaded by the defendant, containing only the usual terms, upon which their claim would rest, if such a deed did not exist

(c) *Howe v. Nappier*, 4 Burr. 1944. The records of suggestions for prohibitions, are in general, very regularly kept at the office of the Clerk of the Papers,

but the particular suggestion in this case could not be found, although a very diligent search was made by the officer.

the objection to the mode of trial pursued in that Court, and to the necessity of two witnesses to prove the execution of a deed, can hardly arise. In a case relating to the jurisdiction of the Court of Admiralty on a deed of hypothecation of a ship by the master, which came before the Court of King's Bench a few years ago, one of the learned judges of that Court (*d*) said, "If the Court of Admiralty, has *jurisdiction over the subject-matter*, the circumstance of the instrument being under seal, does not deprive them of their jurisdiction" (*e*).

7. In a case where the defendants in the Court of Admiralty pleaded a deed, by the terms whereof the mariners agreed to subject themselves to the loss of their wages in particular circumstances, and the plaintiff replied that the deed was obtained by fraud and circumvention, and the Court of Admiralty declared it to have been so, and gave sentence for the plaintiff to recover his wages; the Court of King's Bench, upon application for a prohibition, said, "This is only a deed on one side to forfeit the wages upon particular circumstances, but will not enable them to sue for their wages at law; the deed, therefore, comes in, only by way of incident, and then they may proceed to try it. There can be no prohibition" (*f*).

8. In proceeding against the ship in specie, if the value thereof be insufficient to discharge all the claims upon it, the seaman's claim for his wages is preferred before all other charges (*g*), for the same reason that the last bottomry-bond is preferred to those of an earlier date: the labour of the seamen having brought the ship to the destined port, has furnished to all other persons the means of asserting their claims upon it, which otherwise they could not have had.

9. But all suits and actions brought in the Court of Admiralty for seamen's wages must be commenced within *six* years next after the cause of such suit or action shall accrue, unless the party entitled to sue shall at that time be within the age of twenty-one years, a feme covert, *non compos mentis*, or imprisoned, or unless such party, or the party sued, shall be at that time beyond

(*d*) Mr. Justice Buller, 3 Term Rep. K. B. 170.

(*e*) Menetone v. Gibbons, 3 Term Rep. K. B. 207.

(*f*) Buck v. Atwood, 2 Stra. 761.

(*g*) The Favorite, De Jersey, 2 Rob. Ad. Rep. 232; French Ordin. liv. 1, tit. 14, de la saisie des vaisseaux, art. 16, and Valin thereon. Code de Commerce, art. 192.

the seas; in which cases the suit may be brought within *six* years after the party suing shall be of full age, discreet, of sane memory, or at large; or either the party suing, or the party sued, shall return from beyond the seas (*h*).

10. In the Courts of Common Law the seamen may sue either the master, as the person immediately contracting with them and answerable to them, or the owners, as the persons virtually contracting with them, through the agency of the master, and answerable for the performance of his engagement. And actions in the Courts of Common Law are also limited to the same period of *six* years, with the same provisoes (*i*), unless they are founded on a contract under seal; if they are founded on such a contract, the statutory limitation does not apply to them; but after a lapse of *twenty* years, the claims will be presumed to have been satisfied without any proof of payment.

In suits in the Courts of Common Law, the form of action depends upon the nature of the contract: if the contract be under seal, and delivered as a deed, an action of debt or covenant must be brought; if it be not under seal, or not so delivered, an action of debt or of assumpsit (*j*). And in order to enable the plaintiff to frame his declaration correctly, a Judge of the Court will order the defendant to show the articles to the attorney for the plaintiff, and if necessary, to give him a copy of them. The plaintiff is not bound to show that the ship earned freight: the defendant must prove the negative, if such proof will furnish a defence (*k*).

The course of pleading to be adopted by the defendant depends upon the form of the plaintiff's declaration, according to the general rules and distinctions respecting actions of debt, covenant and assumpsit, of which the consideration does not properly belong to a Treatise on a single branch of the law.

§ 11. In addition to the methods of recovering wages before

(*h*) 4 Anne, c. 16, s. 17, 18 and 19. The length of time thus allowed may be very inconvenient in the case of a suit against the ship, if the property thereof has been changed. The French Ordinance allows only one year.

(*i*) 21 Jas. 1, c. 16, s. 3 and 7, and 4 Anne, c. 16, s. 19.

(*j*) Clement v. Gunhouse, cited before, part 4, c. 1, s. 1, p. 435.

(*k*) Brown v. Milner, 7 Taunt. 319.

The earning of freight is not in all cases necessary to entitle seamen to their wages; as, suppose a ship goes out in search of a cargo, and not being able to procure one, returns empty, will the seamen be entitled to their wages unless there be an agreement to the contrary? See the judgment of Lord Stowell, in the case of the Neptune, Clark, 1 Hag. Ad. Rep. 227.

mentioned, and to give greater facility for the recovery thereof, the 5 & 6 Wm. 4, c. 19, adopting a provision introduced by a former act (*l*), gives a summary and less expensive mode of recovering wages, where the amount does not exceed 20*l.*,—enacting, that in such cases it shall be lawful for any justice of the peace residing near to the place where the ship shall have ended her voyage; cleared at the Custom House, or discharged her cargo, or near to the place of residence of the master or owner, upon complaint on oath by the seaman, or on his behalf, to summon the master or owner before him, and to examine *upon the oath of the parties*, and of their witnesses (if any), touching the complaint and the amount of wages due, and to make order for payment as shall appear to him to be reasonable and just; and that, in case such order shall not be obeyed within two days after the making, such justice may issue his warrant to levy the amount awarded, and all expenses, by distress and sale of the goods of the party upon whom the order shall have been made; and if sufficient distress cannot be found, may cause the amount to be levied upon the ship and furniture; and if they be not within his jurisdiction, may cause the party by whom the order was made to be apprehended and committed to gaol until the amount, with all costs, shall be paid; which award and decision is to be final and conclusive on both parties (*m*). And in order to enforce the adoption, where applicable, of this less costly remedy, it is by a subsequent clause enacted, that if any suit for wages instituted in an Admiralty Court, or in any Court of Record in the *British* dominions, it shall appear to the judge that the plaintiff might have had an effectual remedy by the mode above prescribed, the judge is to certify accordingly, and thereupon no costs of suit are to be awarded to the plaintiff.

The clause in the repealed statute (59 Geo. 3, c. 58), which gave a power of appeal to the Court of Admiralty from the decision of the justices, has not been re-enacted.

The burthen of producing the written contract in cases of dispute with the mariners, is cast on the master and owners. § (*n*).

(*l*) 59 Geo. 3, c. 58.

(*n*) Sect. 5.

(*m*) 5 & 6 W. 4, c. 19, s. 15.

ADDENDA.



COURT OF EXCHEQUER.

Sittings in Banco after Hilary Term, 1840.

ARTHUR *v.* BARTON.

Alderson, B., delivered the judgment of the Court as follows:—
The point reserved by the learned judge was, whether the master of a coasting vessel could, by a contract made in *England*, bind his owner, who also resided in this kingdom, the contract being for a loan of money for the necessary use of the ship.

Here the owners resided in *North Wales*, and the contract was made at *Cardiff*, in the county of *Glamorgan*. We think this was a question of fact, and was properly left to the jury by the learned judge.

Under the general authority which the master of a ship has, he may make contracts and do all things necessary for the due and proper prosecution of the voyage in which the ship is engaged. But this authority does not usually extend to cases where the owner can himself personally interfere, as in the home port, or in a port in which he has beforehand appointed an agent, who can personally interfere to do the things required. Therefore, if the owner or his general agent be at the port, or so near to it as to be reasonably expected to interfere personally—the master cannot, unless specially authorized, or unless there be some usual custom of trade warranting it, pledge the owner's credit at all, but must leave it to him or his agent to do what is necessary. But if the vessel be in a foreign port, where the owner has no agent, or if in an English port, but at a distance from the owner's residence, and provisions or other things require to be provided promptly, there the occasion authorizes the master

to pledge the credit of the owner. But then the further question arises—for what things he may pledge that credit?

This also is limited either to such things as are necessary, or as both Lord *Tenterden* in his book on the Law of Merchant Ships and Seamen, (ante, p. 121), and Mr. Justice *Story*, in his valuable work on Agency, (sect. 122), very clearly lay it down to such things as are reasonably fit and proper for the ship or for the voyage, under the circumstances of the case.

But if repairs are needed, it is admitted he may pledge the owner's credit for them. But repairs are only instances of the above rule. If, therefore, money be necessary, it may be raised upon credit. In the case cited of *Robinson v. Lyall* (a), this was done. There, without money the wages of the seamen could not be paid, and unless they were paid, the seamen might have refused to assist in the further navigation of the ship. The Court therefore held, that the master could pledge the owner's credit for money to that extent. So also it may in some cases be necessary to pay harbour dues or pilotage, or the like, and to pay them in ready money, and if that be the case, and the prosecution of the voyage cannot take place till they are discharged, then also a necessity for having money in specie may arise; and if so, the master would be authorized, under his general power of doing all things necessary for the due prosecution of the voyage, to procure money by loan, and to bind the owner by a contract for that purpose.

It is not doubted that in a foreign port, where the owner has no agent, this may be done (b), and we think that all these questions are referrible to one general principle, although when it is applied to a case like the present, it will require stronger circumstances to establish the fact of the necessity upon which the liability of the owner must depend.

In the present case the learned judge, left the question to the jury, and they have found for the plaintiff. There was clearly evidence on which they might reasonably act, and as the verdict is under 20*l.*, we should not, even if we doubted as to the propriety of their conclusion, interfere to grant a new trial.

(a) 7 Price, 592.

(b) *Evans v. Williams*, ante, p. 117.

COURT OF EXCHEQUER.

Sittings in Banco after Hilary Term, 1840.

LUCEY *v.* INGRAM.

Parke, Baron, delivered the judgment of the Court:—This was an action brought by the plaintiff, to recover damages for an injury sustained by him, in consequence of a ship of the defendant's having run foul of the plaintiff's barge, in the river *Thames*, between *London* and *Gravesend*. The defendant pleaded that at the time when the accident occurred, his ship was navigating and passing on the river *Thames*, under the conduct of a licensed pilot, who then had the charge of the ship, as such pilot, under and in pursuance of the provisions of the Pilot Act, and that the damage was occasioned to the plaintiff by the default and incapacity of such pilot so acting in charge of the ship.

The plaintiff replied, that previously to the accident, the defendant's ship had, on completing a voyage from *India*, been brought by a licensed pilot into the *St. Katherine's Dock*, and having there discharged her cargo was, at the time of the accident, in the act of being removed from the *St. Katherine's Dock* to a certain dry dock in the port of *London*, for the purpose of being there repaired; and was not otherwise navigating or passing on the river *Thames*.

To this replication the defendant demurred, and the question for the decision of the Court is, whether, according to the facts on this record, the defendant is relieved from his *prima facie* liability to answer to the plaintiff in damages, for the injury occasioned by the neglect of the person who had in fact the charge of his ship.

This depends entirely on the construction of the last Pilot Act, 6 Geo. 4, c. 125. By the second section of that statute it is provided, "that all ships navigating and passing on the river *Thames* (except as thereafter provided) should be conducted and piloted within certain limits there specified, including the limits between *London Bridge* and *Gravesend*, by pilots appointed and licensed for that purpose, by the corporation of the Trinity House, and by no other persons whomsoever; and penalties are imposed by

the act on persons who, not being licensed pilots, take charge of any ship within the limits in question.

The 55th section enacts, that no owner of any ship shall be answerable for any damage which shall happen to any person by reason of the neglect or incapacity of any licensed pilot acting in the charge of such ship under any of the provisions of that act.

The 63rd section provides, "that when any ship shall have been brought into any port by any licensed pilot, nothing in the act contained shall subject to any penalty the master or person having the command of such ship for afterwards removing her in such port for the purpose of entering into, or going out of any dock, or for changing her moorings."

The 72nd section enacts, "that every licensed pilot, who shall without lawful excuse refuse to take charge of any ship wanting a pilot, upon being required so to do by the master, or any person having the command thereof, or being interested therein, shall for every such offence forfeit one hundred pounds."

Under the 55th section of the act, the defendant is clearly exempted from all liability to the plaintiff, if at the time of the accident the pilot was, according to the averment in the plea, in charge of the ship in pursuance of any of the provisions of the act.

The plaintiff does not dispute that the pilot was in fact in charge of the ship, but he says, by his replication, what amounts to this, that at the time of the accident the ship was in circumstances in which the act has not made a pilot necessary, and consequently that the pilot was not in charge of the ship in pursuance of the provisions of the act, but could only be considered as the private servant of the owner.

If the replication does show that the employment of the pilot was indeed mere matter of private arrangement between the parties, that the owner was not bound to employ a pilot, and that the pilot might lawfully have declined to take charge of the ship when called on by the owner, then the argument of the plaintiff might be well founded. But if, under the circumstances, the owner was bound to employ a pilot, or if the pilot, when called on by the owner, was bound to take charge of the ship, then we think that he would be acting under and in pursuance of some of the provisions of the act, and that the owner is entitled to the indemnity given by the 55th section.

It is clear that in the present case the owner need not have em-

ployed a pilot at all. The ship is stated in the replication to have been merely in the act of being removed from the *St. Katherine's Dock*, where she had discharged her cargo to a repairing dock, which brings the case precisely within the exception in the 63rd section.

But we think that under the 72nd section the pilot was bound, when called on, to take charge of the ship for the purpose of removing her to the dry dock, and consequently that he was in charge of the ship under the provisions of the act.

That section requires any pilot, not having a lawful excuse to take charge of any ship *wanting a pilot*, when called on by the master or owner so to do; and the question is, what is the meaning of these words, *any ship wanting a pilot*? If they mean any ship being bound by the provisions of the act to take a pilot, then, inasmuch as the owner or master was certainly not bound under the circumstances appearing on this record to take a pilot, the 72nd section would not apply. But we think this is not the true meaning of these words, and that they must be construed to mean *any ship the master or owner of which thinks fit to require a pilot*.

Had the act contained no other exemption from the obligation to take a pilot, except that contained in the 63rd section, there might have been no great difficulty in holding that the words, *wanting a pilot*, in the 72nd section, meant *for which a pilot is necessary under the provisions of the act*, the effect of which construction would be to make the obligation on the master to take a pilot, and the obligation of the pilot to serve, co-extensive.

But in looking to the act it appears there are other very extensive classes of cases in which the masters of ships are exempted from penalties for not taking a pilot, but in which nevertheless it is impossible to believe that the legislature did not mean to make it the duty of the pilot to serve if called on.

It is only necessary to refer to section 59, by which "all British registered ships arriving from the *Baltic* or *North Sea*, by the *North Channel*, all ships laden with stone coming from *Guernsey* or *Jersey*, and many others, are exempted from penalties for not taking a pilot."

So also by section 62, masters of vessels residing at *Dover*, and being also part-owners, are exempted from the necessity of taking a pilot.

Could the legislature possibly have meant that if the master of

a trading vessel from *Archangel*, or of a ship laden with stone from *Jersey*, should, on arriving within the prescribed limits, have need of, and make a signal for a pilot (see sect. 19), that a licensed pilot should be at liberty to decline to take her in charge on the ground that she was not a ship *wanting a pilot*? It is moreover clear, that the 72nd section in terms, imposes on the pilot the duty of taking in charge any ship of her Majesty when required by the officer in command so to do, and yet the 86th section expressly enacts that no ship belonging to her Majesty shall be bound to take a pilot; from all which it is obvious that the words "wanting a pilot" cannot be confined to ships for which the statute makes a pilot necessary. The correctness of this view of the case is further confirmed by the 25th section of the act, and the schedules to which it refers, the effect of which is to fix the particular sum to be demanded by a pilot when engaged in the very duty of removing a ship into a dry or wet dock; and it is not probable that the legislature would have fixed the rate of payment, if the service rendered by the pilot was mere matter of private contract, and that, which he might, if he thought fit, have declined to perform.

Supposing it then to be established, as we think it is, that the pilot, when called on by the owner, was bound to take charge of the ship, for the purpose of removing her from the *St. Katherine's Dock* to the dry dock, and that he was bound to perform this service at the rate of payment fixed by the act, we think he certainly *was acting in the charge of the ship*, in pursuance of some of the provisions of the act, namely, the provisions contained in section 72, which obliged him to take the ship in charge when required so to do, and the provisions contained in section 25 and the schedules, which precluded him from charging above a certain sum for his services. And as the 55th section exempts the owner from responsibility in respect of accidents happening by reason of the default of any pilot, *acting under or in pursuance of any of the provisions of the act*, we think the defendant is not liable to answer to the plaintiff for the injury he has sustained.

In coming to this conclusion we do not impugn any of the previous decisions.

In *Mackintosh v. Slade*, 6 B. & C, 657, the ship having put into the *London Docks*, but not having broken bulk there, was afterwards removed, under charge of a pilot, to a quay higher up

the river, for the purpose of there discharging her cargo; and while she was in the act of being so removed the accident occurred, through the default of the pilot. On the part of the plaintiff it was there contended, *first*, that under the circumstances of the case the master was not bound to take a pilot; and *secondly*, that as he was not bound to do so, he could not, by voluntarily doing what he need not have done, bring himself within the protection of the 55th section. The Court decided, that under the circumstances of that case the master was bound to take a pilot, so that the other question did not arise.

We do not advert particularly to the other cases cited at the bar; it is sufficient to say, they are none of them inconsistent with our decision in this case.

It may indeed be admitted, that in many of the cases the judges, in giving their judgments, refer to the obligation of the master to take a pilot, as the ground on which his irresponsibility is founded; and no doubt that is the foundation, and probably the only foundation on which it can rest independently of the statutes. But the language of the exempting clause in the last Pilot Act certainly carries the doctrine further, and it may well be conceived that this extension of the common law doctrine was not accidental, but intentional. The object of the legislature in establishing pilots has been to secure, as far as possible, protection to life and property, by supplying a class of men better qualified than ordinary mariners to take charge of ships, in places where, from local causes, navigation is attended with more than common difficulty. To effect this object, it has in general been made the duty of the master of every ship, on arriving at any of the places in question, to take a pilot on board, and to give up to him the navigation of the vessel. The master, however well qualified to conduct the ship himself, is bound, under a penalty, in great measure to divest himself of its control, and to give up the charge to the pilot.

As a necessary consequence, the master and owners are exempted from responsibility for acts resulting from the mismanagement of the pilot. But the legislature has considered that there may be some classes of cases in which the presumption of due competency on the part of the master is so great, as to make it safe to relieve him from the obligation of taking a pilot, if he chooses to navigate for himself; still, however, making it the duty of the pilot to serve, if required so to do; and in most of

such excepted cases, preventing the master from employing any person other than a licensed pilot, if he does not undertake the navigation himself. The language in which the legislature has exempted masters and owners from responsibility on account of accidents arising from the default of the pilot, is certainly comprehensive enough to embrace these latter cases, as well as those in which the taking a pilot has been made matter of absolute obligation; and it may have been considered desirable to give this more extended exemption, as an inducement to take a pilot, even in cases where such a course might perhaps be safely dispensed with. It is always the interest of the public, that the ship should be under the control of a pilot, because the legislature has taken what it considers due security for his competency; and therefore, even where the taking a pilot is optional on the part of the master, the legislature may well have intended to encourage his employment, by extending, according to our construction of the 55th section, the benefit of exemption from responsibility.

Whether, however, this has or has not been intentional on the part of the legislature, we think the extended construction must prevail. The case before us is clearly within the words of the exempting clause; and we must therefore hold it to be within its spirit and meaning, unless (which is not the case) some manifest inconvenience or inconsistency should result from our so doing.

For these reasons we think that judgment must be for the defendant.

APPENDIX.

No. I.

Form of a Bottomry Bond.

KNOW ALL MEN by these presents, That I, *A. B.* commander and two-thirds, owner of the ship *Exeter*, for myself, and *C. D.* remaining third-owner of the said ship, am held and firmly bound unto *E. F.* in the penal sum of *two thousand pounds* sterling, for the payment of which well and truly to be made unto the said *E. F.* his heirs, executors, administrators, or assigns, I hereby bind myself, my heirs, executors, and administrators, firmly by these presents. *In witness* whereof I have hereunto set my hand and seal, this 14th day of *December*, in the year of our Lord 1796.

Whereas the above bound *A. B.* hath taken up and received of the said *E. F.* the full and just sum of *one thousand pounds* sterling, which sum is to run at respondentia on the block and freight of the ship *Exeter*, whereof the said *A. B.* is now master, from the port or road of *Bombay* on a voyage to the port of *London*, having permission to touch, stay at, and proceed to all ports and places within the limits of the voyage, at the rate or premium of *twenty-five per cent.* (25 per cent.) for the voyage. In consideration whereof usual risks of the seas, rivers, enemies, fires, pirates, &c. are to be on account of the said *E. F.* And for the further security of the said *E. F.* the said *A. B.* doth by these presents mortgage and assign over to the said *E. F.* his heirs, executors, administrators, and assigns, the said ship *Exeter*, and her freight, together with all her tackle, apparel, &c. And it is hereby declared, that the said ship *Exeter* and her freight, is thus assigned over for the security of the respondentia taken up by the said *A. B.* and shall be delivered to no other use or purpose whatever, until payment of this bond is first made, with the premium that may become due thereon.

Now the condition of this obligation is such, that if the above bound *A. B.* his heirs, executors, or administrators, shall and do well and truly pay, or cause to be paid unto the said *E. F.* or his attornies in *London*, legally authorized to receive the same, their executors, administrators, or assigns, the full and just sum of 1,000*l.* sterling, being the principal of this bond, together with the premium

which shall become due thereupon, at or before the expiration of *ninety* days after the safe arrival of the said ship *Exeter*, at her moorings in the river *Thames*, or in case of the loss of the said ship *Exeter*, such an average as by custom shall have become due on the salvage, then this obligation to be void and of no effect, otherwise to remain in full force and virtue. Having signed to three bonds of the same tenor and date, to one of which being accomplished, the other two to be void and of no effect.

A. B. for self } (L. s.)
and *C. D.** }

Signed, sealed and delivered, where }
no stamped paper is to be had, } *G. H.*
In the presence of } *I. K.*

—◆—
No. II.

Form of a Bottomry Bill.

To all men to whom these presents shall come. I, *A. B.* of Bengal, mariner, part-owner and master of the ship, called the *Exeter*, of the burthen of five hundred tons and upwards, now riding at anchor in Table-Bay, at the Cape of Good Hope, send greeting :

Whereas I, the said *A. B.* part-owner and master of the aforesaid ship called the *Exeter*, now in prosecution of a voyage from Bengal to the port of London, having put into Table-Bay for the purpose of procuring provision and other supplies necessary for the continuation and performance of the voyage aforesaid, am at this time necessitated to take up upon the adventure of the said ship, called the *Exeter*, the sum of *one thousand pounds*, sterling monies of Great Britain, for setting the said ship to sea, and furnishing her with provisions and necessaries for the said voyage, which sum *C. D.* of the Cape of Good Hope, master attendant, hath at my request lent unto me, and supplied me with at the rate of *twelve hundred and twenty pounds* sterling for the said *one thousand pounds*, being at the rate of *one hundred and twenty-two pounds* for every *hundred pounds* advanced as aforesaid, during the voyage of the said ship from Table-Bay to London. Now know ye, that I, the said *A. B.* by these presents, do, for me, my executors and administrators, covenant and grant to and with the said *C. D.* that the said ship shall,

(a) In this bond, the occasion of borrowing the money is not expressed, but the money was in reality borrowed to refit the ship, which being on a voyage from Bengal to London, was obliged to put back to Bombay to repair. See the *Exeter*, Whitford, 1 Rob. Ad. Rep. 176. The occasion, therefore, of borrowing the money, gave the lender the security of the entire interest of the ship. But this bond, although expressed to be executed by the master for himself and the other part-owner, would not bind the other part-owner personally, unless he had by a previous deed authorized the master to execute such a bond for him. See part 4, chap. 1, sect. 2.

with the first convoy which shall offer for England, after the date of these presents, sail and depart for the port of London, there to finish the voyage aforesaid. And I, the said *A. B.* in consideration of the sum of *one thousand pounds* sterling to me in hand paid by the said *C. D.* at and before the sealing and delivery of these presents, do hereby bind myself, my heirs, executors and administrators, my goods and chattels, and particularly the said ship, the tackle and apparel of the same, and also the freight of the said ship, which is or shall become due for the aforesaid voyage from Bengal to the port of London, to pay unto the said *C. D.* his executors, administrators or assigns, the sum of *twelve hundred and twenty pounds* of lawful British money, within thirty days next after the safe arrival of the said ship at the port of London from the same intended voyage.

And I, the said *A. B.* do, for me, my executors and administrators, covenant and grant to and with the said *C. D.* his executors and administrators, by these presents, that I, the said *A. B.* at the time of sealing and delivering of these presents, am a true and lawful part-owner and master of the said ship, and have power and authority to charge and engage the said ship with her freight as aforesaid, and that the said ship, with her freight, shall at all times after the said voyage, be liable and chargeable for the payment of the said *twelve hundred and twenty pounds*, according to the true intent and meaning of these presents.

And lastly, it is hereby declared and agreed by and between the said parties to these presents, that in case the said ship shall be lost, miscarry, or be cast away before her arrival at the said port of London from the said intended voyage, that then the payment of the said *twelve hundred and twenty pounds* shall not be demanded, or be recoverable by the said *C. D.* his executors, administrators or assigns, but shall cease and determine, and the loss thereby be wholly borne and sustained by the said *C. D.* his executors and administrators, and that then and from thenceforth every act, matter and thing herein mentioned on the part and behalf of the said *A. B.* shall be void; any thing herein contained to the contrary notwithstanding.

In witness whereof the parties have interchangeably set their hands and seals to four bonds of this tenor and date, one of which being paid, the others to be null and void.

At the Cape of Good Hope, this
15th day of *November*, in the year
of our Lord one thousand seven
hundred and ninety-seven.

Witness, { *E. F.*
 { *G. H.*
 { *I. K.*

A. B. (L. s.)

The Form of a Respondentia Bond on a Voyage to the East Indies.

KNOW all men by these presents, That we, James Peter Fearon, commander of the ship *Belvidere*, in the service of the Honorable East India Company, and Peter Douglas of Fitzroy-square, are held and firmly bound to Hans Busk of New Broad-street, London, merchant, in the sum or penalty of *fifteen hundred pounds* of good and lawful money of Great Britain, to be paid to the said Hans Busk, or to his certain attorney, executors, administrators or assigns; to which payment well and truly to be made, we bind ourselves, jointly and separately, our heirs, executors and administrators, firmly by these presents. Sealed with our seals, dated this *fourth* day of *May*, in the *forty-first* year of the reign of our Sovereign Lord *George the Third*, by the grace of God, of the United Kingdom of Great Britain and Ireland King, defender of the faith, and in the year of our Lord one thousand eight hundred and one.

Whereas the above-named Hans Busk has, on the day of the date above-written, advanced and lent unto the said James Peter Fearon and Peter Douglas the sum of *seven hundred and fifty pounds*, upon the goods and merchandizes and effects laden and to be laden on board the good ship or vessel called the *Belvidere*, of the burthen of 987 tons or thereabouts, now riding at anchor in the river of Thames, outward-bound to China, and whereof James Peter Fearon is commander, by his acceptance of a bill of exchange to that amount at four months' date for the account of them the said James Peter Fearon and Peter Douglas: Now the condition of this obligation is such, that if the said ship or vessel do and shall with all convenient speed proceed and sail from and out of the said river of Thames on a voyage to any port or place, ports or places in the East Indies, China, Persia, or elsewhere beyond the Cape of Good Hope, and from thence do and shall sail, return, and come back into the said river of Thames at or before the end and expiration of *thirty-six* calendar months, to be accounted from the day of the date above-written, and there to end her said intended voyage (the dangers and casualties of the seas excepted); and if the said James Peter Fearon and Peter Douglas, or either of them, their or either of their heirs, executors or administrators, do and shall within *thirty days* next after the said ship or vessel shall be arrived at her mooring in the said river of Thames from her said intended voyage, or at or upon the end and expiration of the said *thirty-six* calendar months, to be accounted as aforesaid (which of the said times shall first and next happen), well and truly pay or cause to be paid unto the said Hans Busk, his executors, administrators or assigns, the full sum of *one thousand and twenty pounds* of lawful money of Great Britain, together with *thirteen pounds ten shillings* of like money per calendar month for each and every calendar month, and so proportionably for a greater or lesser time than a calendar month, for all such time and so many calendar months as shall be elapsed and run out of the said *thirty-six* calendar months over and above *twenty* calendar months, to be accounted from the

day of the date above written, or if in the said voyage, and within the said *thirty-six* calendar months to be accounted as aforesaid, an utter loss of the said ship or vessel by fire, enemies, men of war, or any other casualties shall unavoidably happen, and the said James Peter Fearon and Peter Douglas, their heirs, executors or administrators, do and shall within *six* calendar months next after such loss, well and truly account for (upon oath if required), and pay unto the said Hans Busk, his executors, administrators or assigns, a just and proportionable average on all the goods and effects of the said James Peter Fearon carried from England on board the said ship or vessel, and the net proceeds thereof, and on all other goods and effects which the said James Peter Fearon shall acquire during the said voyage, for or by reason of such goods, merchandizes, and effects, and which shall not be unavoidably lost, then the above written obligation to be void and of none effect, else to stand in full force and virtue.



No. IV.

The Form of an Instrument of Hypothecation of Ship and Cargo.

Know all to whom this instrument of bond and bill of maritime risk and bottomry may come, That in the year from the birth of our Lord Jesus Christ 1801, on the 31st day of the month of *January*, in the city of Lisbon, in my office personally appeared Jacomo Mazzola, captain of the Imperial ship called the *Gratitude*, whom I know to be the real person; and he declared to me, the notary, in the presence of the witnesses hereinafter mentioned, that within twenty-four hours after the arrival of his said ship at London, or any other port, and previous to beginning to make any delivery of the cargo at the port aforesaid, or any other port, that he the captain or whomsoever may act in lieu of him, or in case of his absence, or perform the duties of his said quality, shall or will pay by this bill of risk, sea exchange, and bottomry, to Francis Manoel Calvert, professed in the order of Christ, or to his order, the sum of 5,273*l.* 12*s.* sterling, principal and premium of risk and sea exchange, at the rate of 16 *per cent.*, the which principal he acknowledged to have received here of the said Francis Manoel Calvert, in the good current money of this kingdom, under the denomination of true and legitimate money of sea exchange and bottomry, on the hull, keel, and appurtenances of the aforesaid ship, and therewith to supply the wants of the repairs, caulking, and of the cargo of the same, on which he had effectively invested it; the said Calvert taking upon himself, and in consideration of the aforesaid premium of 16 *per cent.*, voluntarily agreed for and settled between them, to run the sea risk on the said hull, keel, and appurtenances, and cargo of the said ship, in her ensuing voyage, which the said captain is about prosecuting from this port of Lisbon to that of London;—these being the risks which the aforesaid Francis Manoel Calvert takes on himself, and is to run, such as of the

sea, winds, fire, stranding, and shipwreck, enemies, and false friends, detentions of princes, and reprisals, during the whole of the said voyage, excepting nevertheless those of barratry of the master, and of average as well particular as general, the which are expressly excluded; the which risk shall commence to run from the hour the ship shall heave her first anchor to set sail from this port to that of London, and shall cease in twenty-four hours after having come to an anchor; and for the ready payment of the aforesaid sum, he the captain binds himself, and his effects in general, dues and funds, both in actual possession and future, and by special mortgage the cargo, freights due, or that may become due; and in case of failure of the prompt payment in due time, he binds himself under this clause of mortgage to pay to him or his order, for all the delay until full payment, at and after the rate of *six per cent. per annum*; and there being also present Andrew Belucci, mate of the said ship, by whom it was declared, that in case of the absence of the aforesaid captain, he bound himself to fulfil the contents of this bond they thus executed and accepted, after these presents being read to them, and I the notary in the name of whomsoever it may concern being absent; to all which were witnesses present, Joav Pedro Roeks, who also acted as interpreter as well for the captain as for the mate, he being there vice-consul, and Manoel Eugenio Coetho, who together with the parties signed thereto. J. Joge de Almeida Rorig the notary wrote it: Jacomo Mazzola, Andrew Bellucci, Joav Pedro Roeks, Manoel Eugenio Coetho; and J. Joge de Almeida Rorig, notary public of notes in the city of Lisbon and its district of his Royal Highness the Prince Regent our lord, whom God preserve, caused this instrument to be transcribed from my book of notes, to which I refer myself, and have subscribed it, and signed it in public form.

In testimony of the truth,

JOGE DE ALMEIDA RORIG.

Whose handwriting is certified by

FRANCIS ARBOUIN,

Vice-Consul.

Francis Manoel Calvert.



No. V.

Stipulation for the return of a Ship.

MARY ANN.

January 12, 1804.

ON which day Bogg exhibited as proctor, and made himself a party for George Goodwin Hope, master of the said ship Mary Ann, and produced for sureties Josiah Culnér of Wapping High-street, mathematical instrument maker, and James Powell of the same place, un-

Present.

BEDFORD:

No. VI.

On this day of in the year of our Lord one thousand eight hundred and personally appeared and presented himself at the office of *R. B.*, notary public, *C. D.*, master of the ship or vessel, the *Mary*, which sailed on a voyage from on the of last, and arrived at on the of instant, laden with a cargo of And the said master hereby gives notice of his intention of protesting, and causes this note or minute, of all and singular the premises, to be entered in this register.

C. D.

By the public instrument of protest hereinafter contained or annexed hereto

Be it known and made manifest unto all people, that on the
day of _____ in the year of our Lord one thousand
eight hundred and _____ personally came and appeared before
R. B., notary public, duly authorized, admitted, and sworn, residing
and practising in _____ in the county of _____ in the
United Kingdom of Great Britain and Ireland, and also a Master
Extraordinary of the High Court of Chancery in England, *A. B.*,
master of the ship or vessel, the *Eleanor Elspet*, belonging to Liver-
pool, *C. D.*, chief mate, and *E. F.*, carpenter of the said vessel, who
did severally, duly, and solemnly declare and state as follows: that

is to say, that these appearers and the rest of the crew of the said vessel, set sail in her from Calcutta on the 12th of August last, bound on her voyage from thence to Liverpool, laden with a cargo of general goods, the vessel being then tight, staunch and strong; well manned, victualled, and sound, and in every respect fit to perform her said intended voyage.

That they proceeded on their voyage with fine weather and variable winds, accompanied occasionally with rain, until the 19th, when they had fresh gales from the south-west, and passing squalls, and a heavy sea running, and they shipped large quantities of water on deck and over all parts of the ship, the vessel plunging the bowsprit end under water; at noon, being in latitude 14 degrees 22 minutes north, longitude 88 degrees 13 minutes east, they had fresh gales south-west by west, with showers of rain; at thirty minutes past one they got the bowsprit secured, the ship labouring and shipping great quantities of water. On the 20th they had fresh gales and squally weather, accompanied with rain; at noon they had fresh winds from the south-west, and a heavy sea running, the ship labouring very much, and every attention being paid to the pumps. That they continued on their voyage with variable winds and cloudy weather, accompanied occasionally with rain, thunder, and lightning, but without any extraordinary occurrence, until the 30th of September, when they arrived off the Isle of France, and at four p. m., came to anchor at Port Louis, took in water there, and on the 3rd of October again proceeded on their voyage with fine weather until the 21st of October, which commenced with strong winds from the north-west, and a heavy confused sea, the ship labouring very much. Thus they proceeded on their voyage, and on the 14th of November, at three p. m., made the island of St. Helena, bearing north-west by west. On the 15th, at four a. m., kept away for the port, took in water there, and at thirty minutes past eleven bore away, and set all possible sail. That they proceeded on their course, and on the 18th of December, being in latitude 32 degrees west, had fresh gales from west-north-west, with cloudy weather, and frequent showers of rain, the ship labouring very much, and continually shipping heavy seas over all, and filling the decks with water. At fifteen minutes past eleven a. m., kept the ship away to go to eastward of the Azores, the squalls being very heavy, and the sea continually breaking over her, and the same bad weather continued until midnight, with a cross sea running. On the 19th more moderate, but at ten p. m., had freshening winds from the north-east to north, the gale increasing; at eleven p. m., carried away the gib-sheet, and tore the sail nearly all to pieces before they could stow it. On the 21st they had more moderate weather, and proceeded on their voyage. On the 24th they made the island of St. Mary's, distant eight leagues. On the 25th the wind increased from the west-north-west; at one a. m., they had strong winds from the westward, accompanied with rain, which carried away their fore-topmast studding-sail boom; at thirty minutes past two they had a heavy sea from the north-west; at thirty minutes past seven a. m., the ship laboured very much, and shipping tons of water on deck, the main deck continually full of water, and they were trying the pumps every opportunity, and pumping every four hours. On the 27th

they had steady winds from the south-west, and cloudy weather at noon, in latitude 41 degrees 27 minutes north, longitude 20 degrees 43 minutes west; at three p. m., double reefed the fore-topsails; at eight they had strong winds with heavy squalls from the west-south-west, the sea getting up considerably; at nine they had tremendous gales from the west-south-west, and a heavy sea broke on board, which carried away the long boat and skiff, bulwark rails, stanchions, and swept the decks of spars and various other articles, and the pumps were instantly set on; at ten p. m., had tremendous gusts, and a sea broke into the starboard quarter boat and burst her, and she was necessarily obliged to be cut away. That in the course of the night they were continually pumping, found the ship to make a great deal of water, and on getting a light forward on the main deck, in order to ascertain the extent of the damage, found the deck stove in very badly, and supposed it originated from the force of the boat or spars going overboard, the water still gaining on them, they were obliged to continue at the pumps throughout the night, and they found several stanchions gone on the larboard side, and also all the oars, rudders, and every thing belonging to the long-boat and skiff, which were lashed inside, also six water-casks, and six more from the decks, which were properly lashed, several spars were lost, which were partially washed over the side, and which they were obliged to throw away, not being able to get them in; the best main-topmast studding-sail, and all the studding-sail yards were washed overboard, with all the studding gear, and other ropes, and every light article about the decks, although every thing had been securely lashed before the bad weather commenced. That the 28th commenced with heavy gales from the north-west to north north-west, being in latitude 42 degrees 45 minutes north, longitude 18 degrees west, the ship in the same state as on the preceding day; at daylight no alteration, the ship a perfect wreck, and they cleared up what spars remained, and secured them, and finding the ship straining exceedingly, and being afraid of losing more stanchions, they were obliged to cut the guns adrift, and put them overboard with the carriages, the shot having previously rolled out of the shot-rack overboard, and they were obliged, in order to lighten the ship, and for the safety and preservation of the vessel, crew, and rest of the cargo, consisting of *[here describe the goods or articles voluntarily thrown overboard for the common benefit of all concerned]*, which was accordingly done; at noon they had fresh winds, west by north, and cloudy weather, with a heavy sea running, and still shipping much water on deck, and pumping ship every hour; and during the remainder of the day they had strong squalls at intervals, until midnight. That they continued on their voyage, generally with strong squalls, fresh gales and cloudy weather, with hail and showers of rain, accompanied with lightning and heavy seas, and constantly shipping seas, the pumps being attended to every hour, until the first of January, when at noon they had fresh winds from the south-west; at ten p. m., the *Skerries* light bore east north-east, distant three leagues; at one a. m., on the 3rd, they rounded the *Skerries*; at two, took a pilot on board; at daylight they made all possible sail for the ~~new channel~~, and got into the river Mersey, in the port of Liverpool, at three p. m.; and at six p. m., they got safely moored in

Appendix.

the Prince's Dock. And this appearer, *A. B.*, further declares, that on the following day he appeared at the office of the said notary, and caused his protest to be duly noted.

And these appearers do protest, and I, the said notary, do also protest against the aforesaid bad weather, gales, storms, accidents, and occurrences, and all loss or damage occasioned thereby, *the same being entirely owing to the facts and circumstances before mentioned (b).*

We, *A. B.*, *C. D.*, and *E. F.*, do solemnly and sincerely declare (c) that the foregoing statement is correct, and contains a true account of the facts and circumstances; and we make this solemn declaration, conscientiously believing the same to be true, and by virtue of the provisions of an act made and passed in the sixth year of the reign of his late Majesty, King William the 4th, entitled "An Act to repeal an Act of the present Session of Parliament, entitled 'An Act for the more effectual Abolition of Oaths and Affirmations, taken and made in various departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of Voluntary and Extrajudicial Oaths and Affidavits, and to make other Provisions for the Abolition of unnecessary Oaths.'"

A. B.

C. D.

E. F.

Thus declared and protested in due form of law, at the office of me, the said notary, at the day and year first before written.

R. Brooke,

Notary Public, Liverpool(d).

[Seal]

No. VII.

Ship Protest in consequence of a Loss by Collision.

By the public instrument of protest hereinafter contained or annexed hereto,

Be it known and made manifest unto all people, That on the day of , in the year of our Lord One thousand eight hundred and , personally came and appeared before me, *R. B.*, notary public, duly authorized, admitted, and sworn, residing and

(b) The words in italics are sometimes introduced, but they only tend to lengthen the instrument, and are not of any real use.

(c) Before the act 5 & 6 Wm. 4, c. 62, ship protests were usually sworn to by the appearers.

(d) This and the following protests are taken from the Appendix to a "Treatise on the Office and Practice of a Notary," by Richard Brooke, Saunders & Benning, 1839, in which the reader will find much valuable information on the subject of protests, and also on all other mercantile instruments in the preparation of which the assistance of a notary is useful or necessary.

practising in _____, in the county of _____, in the United Kingdom of Great Britain and Ireland, and also a Master Extraordinary of the High Court of Chancery in England, *A. B.*, master of the sloop or vessel the *Anne Mary*, belonging to Liverpool, *C. D.* mate, and *E. F.* seaman of the said vessel, who did severally duly and solemnly declare and state as follows : That is to say, That on the 1st day of February instant, about half-past three p. m., these appearers and the rest of the crew of the said vessel set sail in her from Liverpool, bound on a voyage to Hatchett, near Bridgewater, laden with a cargo of hides, the said vessel being then tight, staunch, and strong, well manned, victualled, and sound, and in every respect fit to perform her said intended voyage. And these appearers, the said *A. B.* and *E. F.*, for themselves, declare and say, That about half-past two a. m., on the 2d of February, whilst the vessel was proceeding on her said intended voyage, the other appearer, the said *C. D.*, being below in bed, and the said vessel being between the Great Ormshead and Point Linus, the wind being about east-south-east, with moderate weather and smooth water ; the vessel running before the wind, and steering about west-north-west, under all sail, with a square-sail and half top-sail set ; and this appearer, *A. B.*, being then at the helm, and this appearer, *E. F.*, being forward, he called out that he saw a light on the starboard bow ; and they at first thought that it was Point Linus light, but it afterwards turned out to be the light of the steamer *Vesuvius*. That this appearer, the said *E. F.*, immediately went below for a light, and brought a lanthorn on deck, and showed the light over the starboard bow ; and this appearer, the said *A. B.*, put the helm of the *Anne Mary* to the starboard until the course was altered from west-north-west to south-west, in order to avoid the steamer. That after so altering their course, this appearer, the said *E. F.* shifted the light from the bow to abaft the rigging on the starboard side, to make better seen by the crew on board the steamer ; and both these appearers, the said *A. B.* and *E. F.* called out to the steamer to starboard her helm ; and about five minutes after the light was shown, the steamer struck the *Anne Mary*, and she went down in a minute afterwards. And this appearer, the said *C. D.*, for himself, declares and says, that he was below in bed, and was awoke by the said *A. B.* calling out, " Steamer, ahoy !" and he immediately ran upon deck in his shirt and drawers, and saw the appearer, the said *E. F.*, holding a lanthorn on the starboard quarter ; and this appearer, the said *C. D.*, had not been a minute on deck before the steamer struck the *Anne Mary*. And these appearers, the said *A. B.*, *C. D.*, and *E. F.*, for themselves, declare and say, that immediately after the said *C. D.* came on deck, the steamer struck the *Anne Mary* nearly amidships, and, for the preservation of their lives, these appearers, and another of the crew of the *Anne Mary*, jumped on board the steamer, and arrived back at Liverpool in her on the 2d day of February ; and on the same day, this appearer, the said *A. B.*, appeared at the office of me, the said notary, and caused his protest to be duly noted. And these appearers do protest, and I, the said notary, do also protest against the said steamer, and the said collision, striking, facts, and occurrences, and all loss or damage occasioned thereby.

Appendix.

We, *A. B.*, *C. D.*, and *E. F.*, do solemnly and sincerely declare, that the foregoing statement is correct, and contains a true account of the facts and circumstances; and we make this solemn declaration, conscientiously believing the same to be true; and by virtue of the provisions of an act made and passed in the sixth year of the reign of his late Majesty, entitled, "An Act to repeal an Act of the present Session of Parliament, entitled, 'An Act for the more effectual Abolition of Oaths and Affirmations taken and made in various departments of the State, and to substitute Declarations in lieu thereof, and for the more entire Suppression of Voluntary and Extrajudicial Oaths and Affidavits, and to make other Provisions for the Abolition of unnecessary Oaths.'"

*A. B.**C. D.**E. F.*

Thus declared and protested in due form of law, at the office of me, the said notary, at L , the day and year first before written.

R. B., Notary Public, Liverpool.

[*Seal.*]

No. VIII.

Protest by Shippers of Goods against the Master and Owners of a Vessel, in consequence of the Master's refusal, after notice, to sign a Bill of Lading in the customary form.

By the public instrument of protest hereinafter contained or annexed hereto,

Be it known and made manifest unto all people, That on the day of , in the year of our Lord one thousand eight hundred and , personally came and appeared before me, *R. B.*, notary public, duly authorized, admitted, and sworn, residing and practising in , in the county of , in the United Kingdom of Great Britain and Ireland, and also a Master Extraordinary of the High Court of Chancery in England, *G. G.*, one of the firm of *G. G. and Company*, of Liverpool, merchants, the shippers of goods and merchandize per ship or vessel the *Frances*, bound on a voyage from Liverpool for New York, in the United States of America, and *C. D.* of Liverpool, clerk to the said *G. G. and Company*, who did severally, duly, and solemnly declare; and first, this appearer, the said *C. D.*, for himself, did declare and state as follows: (That is to say), That this appearer did attend for the said *G. G. and Company*, the shippers, and did conduct the delivery on the day of instant, at and alongside of the said vessel the *Frances*, of goods and merchandize mentioned in the duplicate (or copy) bill of lading hereunto annexed. That *E. F.*, the master of the said ship or vessel, signed and gave a bill of lading for the seven chests of merchandize therein mentioned, with the words "One chest in dispute; if on

board to be delivered; contents unknown," written at the foot thereof; and that the said *G. G. and Company* objected to the same; and that this appearer, the said *C. D.*, was present, and did see the said seven chests of merchandize carefully delivered at and alongside the said vessel, at Liverpool aforesaid, in the usual manner, and left under the charge of the mate and crew thereof. And that, on this day of instant, this appearer, the said *C. D.*, did deliver to the said *E. F.* a notice and demand, signed by the said *G. G. and Company*, of which a copy is hereunto annexed; but the said *E. F.* refused to comply therewith, or to sign or deliver any other bill of lading in another form.

And the appearer, the said *G. G.*, for and on behalf of himself and of his said co-partner in trade, under the said firm of *G. G. and Company*, and for and on behalf of all other persons who are or shall or may be interested in the said goods and merchandize, doth declare and protest before me, and I, the said notary, at the request of the said shippers, the said *G. G. and Company*, do protest against the owners and the said master of the said vessel, for and in respect of the said refusal and neglect to sign and give a correct bill of lading for the said goods, in the usual and customary form, and for and in respect of all fall of markets, loss, damage, costs, or expenses, which the said shippers, or any other person or persons, who is, or are, or shall, or may be or become interested therein, have or hath incurred, or may incur, by reason of the premises.

G. G.

C. D.

Thus done, declared, and protested in due form of law, at the office of me, the said notary, at Liverpool, this day and year first before written.

R. B., Notary Public, Liverpool.

[*Seal.*]

No. IX.

Copy of the Notice to the Master referred to in the foregoing Protest, objecting to the Qualification introduced into the Bill of Lading without consent, and demanding a Bill of Lading in the customary form.

To Captain *E. F.*, Master of the Ship or Vessel called the *Frances*.

WE, the shippers of seven chests of merchandize, hereby give you notice, that we object to the qualification or exception of "One chest in dispute; if on board to be delivered; contents unknown," added without our consent to the bill of lading, signed by you for the said goods, for New York, and that we hold you and the owners of the vessel responsible for the value and safety of all and every goods which we shall prove to have been delivered at the said vessel; and we demand and require you forthwith to sign and to deliver to us a bill of lading for the said goods, in a usual, legal, and customary form;

and we give you notice, that in default thereof, we shall protest against you, and we shall hold you and the owners of the vessel responsible for all loss, damage, costs, or expenses, by reason of the premises.

Liverpool, day of , 183 .

G. G. and Company.



No. X.

Protest by the Master of a Vessel for Demurrage, payable under the Stipulations of a Charter-party.

By the public instrument of protest hereinafter contained or annexed hereto,

Be it known and made manifest unto all people, That on the day of , in the year of our Lord one thousand eight hundred and , personally came and appeared before me, *R. B.*, notary public, duly authorized, admitted, and sworn, residing and practising in , in the county of , in the United Kingdom of Great Britain and Ireland, and also a Master Extraordinary of the High Court of Chancery in England, *C. D.*, master of the ship or vessel the *Sarah*, belonging to the port of , who did duly and solemnly declare and state as follows : (That is to say), That he, this appearer, as such master as aforesaid, did, on or about the day of last, let the said ship to freight to *E. F.*, of ; and a charter-party of the said vessel for a voyage from to Liverpool, and from thence back to , was entered into on the said day of last, and made between this appearer of the one part, and the said *E. F.* of the other part, for the said voyage, whereby it was, amongst other stipulations, engaged and agreed [*here state the number of days allowed for unloading and reloading, and the amount per day to be paid for demurrage, as mentioned in the charter-party.*] That this appearer, pursuant to the said charter-party, did receive on board the said vessel at aforesaid, a cargo of lawful goods, provided and shipped by the agents of the said *E. F.* there, and from thence proceeded therewith on board the said vessel direct to Liverpool aforesaid, where she arrived on the day of instant, and on the instant, when the said vessel had been reported, had got into a proper berth for discharging, this appearer gave notice to *G. H. and Company*, the agents at Liverpool of the said *E. F.*, and to which agents the cargo was addressed, that this appearer was ready to deliver the said cargo of goods ; and that the agents of the said freighter caused the discharge of the said cargo of goods to be commenced, and they received and took the same from the said vessel, and then proceeded to put on board the said vessel another cargo of goods for her voyage back to aforesaid ; but that the agents of the said freighter did not complete the loading thereof until the day of instant, being days beyond the time hereinbefore mentioned and allowed in

and by the said charter-party to the said freighter or his agents, for discharging and reloading the said vessel at Liverpool, as aforesaid, whereby the said freighter hath become liable to pay demurrage for such delay or detention, pursuant to the said charter-party, for days, at and after the rate of per day, amounting to the sum of sterling; and which sum, or any part thereof, the said agents of the said freighter have refused to pay. Wherefore, the said appearer, *A. B.*, on behalf of the owners of the said vessel, and on behalf of himself, as master, doth protest; and I, the said notary, at his request, do also protest against the said freighter, *E. F.*, and against his agents, the said *G. H. and Company*, and against all and every other person or persons whomsoever responsible or liable, or whom these presents do, shall, or may concern, and holding him and them responsible and liable for the breach of the said charter-party, and for all demurrage, damage, injury, loss, wages, costs, and expenses incurred, owing, or sustained, or to be incurred or sustained, by reason of the said breach, delay, detention, or other premises.

Thus done, declared, and protested, &c.

R. B.

[Seal.]

Notary Public, Liverpool.

No. XI.

Protest by the Master of a Vessel against the Consignees of Goods, for not taking and discharging them from the Vessel in a reasonable time.

By the public instrument of protest hereinafter contained, or annexed hereto.

Be it made known and made manifest, unto all people that on the day of in the year of our Lord one thousand eight hundred and personally came and appeared before me, *R. B.*, notary public, duly authorized, admitted, and sworn, residing and practising in in the county of , in the United Kingdom of Great Britain and Ireland, and also a Master Extraordinary of the High Court of Chancery in England, *A. B.*, master of the ship or vessel the *Innes*, belonging to the port of , who did duly and solemnly declare and state as follows (that is to say), that this appearer did, on or about the day of last receive on board the said vessel, at the port of Dantzic, in the kingdom of Prussia [*here describe the goods*], all of which were shipped on board her there by Messrs. *B. and L.*, addressed to *C. D.*, at Liverpool aforesaid; and this appearer duly signed bills of lading, as customary, expressing the said goods to be deliverable to the said *C. D.* at Liverpool, he or they paying the freight for the same, with primeage accustomed. That this appearer proceeded with the said goods on board the said vessel direct to Liverpool aforesaid, where she arrived on the day of instant, and on the day of instant, when the said vessel had been reported, and had got in a proper

berth for discharging, this appearer gave notice to the said *C. D.*, to whom the said goods were addressed, that this appearer was ready to deliver the said goods, but from that time up to the date and making of these presents, neither the said *C. D.*, nor any other person on his behalf, hath received or discharged, or offered to receive or discharge, the said goods from the said vessel, or paid or offered to pay the freight and primeage thereof, although this appearer is willing and desirous to deliver the said goods; and notwithstanding this appearer hath several times applied to, and requested the said *C. D.* to have the said goods discharged from the said vessel, and received by him, yet he still delays and neglects so to do; and that such delay and neglect are unreasonable and injurious to the interests of the owners and master of the said vessel.

Wherefore, the said appearer, *A. B.*, on behalf of the owners of the said vessel, and on behalf of himself as master, doth protest, and I, the said notary, at his request, do also protest against the said *C. D.*, and against all and every other person or persons whomsoever, responsible or liable, or whom these presents do, shall, or may concern, and holding him or them responsible, and liable for all demurrage, damage, injury, loss, wages, costs, and expenses incurred, owing, or sustained, or to be incurred or sustained by reason of the said unreasonable delay, detention, or other the premises.

This done, declared, and protested in due form of law, at the office of me, the said notary, at Liverpool, the day and year first before written.

[*Seal*]

R. B.

Notary Public, Liverpool.



No. XII.

Average Agreement.

Articles of agreement entered into this day of
in the year one thousand eight hundred and be-
tween *A. B.* master of the ship or vessel the *Anna Boleyn*,
belonging to of the one part, and the several per-
sons whose names are hereunto subscribed of the other part;

Whereas the said ship or vessel the *Anna Boleyn* having, on the
day of last sailed from bound
on a voyage from thence to laden with a cargo of
and having, on or about the of following
encountered stormy and tempestuous weather, the said vessel labour-
ing very hard and driving fast on shore, the crew were obliged, for the
safety of the vessel and cargo, to [*here must be recited, clearly and*
carefully, the facts and occurrences which gave rise to the general aver-
age, in order to show that the sacrifice and expenses were for the
benefit of all concerned, and that the parties are liable, in point of law,
to contribute pro rata to the general average ;] whereby or by means
whereof considerable loss has been sustained, and considerable ex-

penses, disbursements, and charges have been incurred, the amount whereof cannot at present be sufficiently ascertained, and which may form a charge on the vessel, freight, and the goods laden on board, or may come under the denomination of a general average, to which the said parties of the second part, being respectively owners, or consignees, or agents of owners or consignees of the goods laden on board thereof may be liable to contribute.

Now these articles witness, that in consideration of the engagements and agreements of the said parties of the second part, hereinafter contained, the said *A. B.* for himself individually, and also for the owners of the said vessel, engages and agrees with each of the said parties of the second part, that he, the said *A. B.*, or the said owners, shall and will deliver, or cause to be delivered, as soon as can be conveniently done, at the port of aforesaid; and on reasonable request the respective goods, wares, and merchandize, so laden on board the said vessel, belonging or consigned respectively unto the several parties of the second part, his or their factors, agents, or assigns, and permit them to receive, take possession, and remove the same, according to their respective rights, positions, or ownerships thereof (the damages and casualties of the seas and navigation, restraints of princes and rulers, fires, pirates, enemies, or other inevitable accident not preventing.) In consideration whereof the said parties of the second part do hereby for themselves, severally and respectively, and not jointly, personally engage and agree with the said master, *A. B.*, individually, and also with the owners of the said vessel, to pay, or cause to be paid, unto the said *A. B.*, or as may be required, unto the owners of the said vessel or their agents, the proper and respective proportions of the said general average loss and expenses, in respect of their respective goods, and all legal charges, salvage, and other expenses to which they are or shall be respectively liable, or which the cargo ought to bear under the aforesaid circumstances, rateable, and in fair proportions; and for the better computing the same, they do hereby further agree to refer the amount and proportion thereof, to be ascertained and adjusted by *C. D.* of

aforesaid, insurance-broker, and whose decision in the premises they do hereby engage to abide by and perform. Witness the hands of the parties, the day and year first before written.

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No. XIII.

3 & 4 Wm. 4, c. 55.

An act for the Registering of British Vessels.

I. WHEREAS an act was passed in the sixth year of the reign of his late Majesty King George the Fourth, intituled "An Act for the Registering of British Vessels," whereby the laws in relation to the registration of British vessels were consolidated and amended: and whereas since the passing of the said act divers acts for the further amendment of the law have been found necessary, and it will be of

6 Geo. 4, c.
110.

Commence-
ment of act.

No vessel to
enjoy privi-
leges until
registered.

4 Geo. 4, c. 41.

Form of certi-
ficate of regis-
try.

advantage to the trade and commerce of the country that the said acts should be consolidated into one act: be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that this act shall commence upon the first day of September, one thousand eight hundred and thirty-three, except where any other commencement is herein particularly directed.

II. And be it further enacted, that no ship or vessel shall be entitled to any of the privileges or advantages of a British registered ship, unless the person or persons claiming property therein shall have caused the same to have been registered in virtue of the said act, or of an act passed in the fourth year of his said late Majesty's reign, intituled, "An Act for the Registering of British Vessels," or until such person or persons shall have caused the same to be registered in manner hereinafter-mentioned, and shall have obtained a certificate of such registry from the person or persons authorized to make such registry and grant such certificate as hereinafter directed; the form of which certificate shall be as follows, *videlicet* :

"This is to certify, that in pursuance of an act passed in the fourth year of the reign of King William the Fourth, intituled 'An Act' [*here insert the title of this act, the names, occupations, and residence of the subscribing owners*], having made and subscribed the declaration required by the said act, and having declared that [*he or they*] together with [*names, occupations, and residence of non-subscribing owners*] [*is or are*] sole owner or owners, in the proportions specified on the back hereof, of the ship or vessel called the [*ship's name*] of [*place to which the vessel belongs*], which is of the burthen of [*number of tons*], and whereof [*master's name*] is master, and that the said ship or vessel was [*when and where built, or condemned as prize, referring to builder's certificate, judge's certificate, or certificate of last registry, then delivered up to be cancelled*], and [*name and employment of surveying officer*] having certified to us that the said ship or vessel has [*number*] decks and [*number*] masts, that her length from the fore part of the main stem to the after part of the stern post aloft is [*number of feet and inches*], her breadth at the broadest part [*stating whether that be above or below the main wales*] is [*number of feet and inches*], her [*height between decks, if more than one deck, or depth in the hold if only one deck*], is [*number of feet and inches*], that she is [*how rigged*] rigged with a [*standing or running*] bowsprit, is [*description of stern*] sterned, [*carvel or clinker*] built, has [*whether any or no*] gallery, and [*kind of head, if any*] head; and the said subscribing owners having consented and agreed to the above description, and having caused sufficient security to be given as is required by the said act, the said ship or vessel called the [*name*] has been duly registered at the port of [*name of port*]. Certified under our hands at the Custom-house in the said port of [*name of port*] this [*date*] day of [*name of month*] in the year [*words at length*].

(Signed)

"Collector.

(Signed)

"Controller."

And on the back of such certificate of registry there shall be an account of the parts or shares held by each of the owners mentioned

and described in such certificate, in the form and manner following :—

Names of the several Owners within mentioned.				Number of sixty-fourth Shares held by each Owner.
[Name	.	.	.	Thirty-two.
Name	.	.	.	Sixteen.
Name	.	.	.	Eight.
Name	.	.	.	Eight.]
(Signed)				Collector.
(Signed)				Controller."

III. And be it further enacted, that the persons authorized and required to make such registry and grant such certificates shall be the several persons hereinafter mentioned and described; that is to say,

Persons authorized to make registry and grant certificates.

The collector and controller of his Majesty's customs in any port in the United Kingdom of Great Britain and Ireland, and in the Isle of Man respectively, in respect of ships or vessels to be there registered :

In United Kingdom and Isle of Man .

The principal officers of his Majesty's customs in the island of Guernsey or Jersey, together with the governor, lieutenant-governor, or commander-in-chief of those islands respectively, in respect of ships or vessels to be there registered :

In Guernsey, &c. :

The collector and controller of his Majesty's customs of any port in the British possessions in Asia, Africa, and America, or the collector of any such port at which no appointment of a controller has been made, in respect of ships or vessels to be there registered :

In Colonies in Asia, Africa, and America :

The collector of duties at any port in the territories under the government of the East India Company, within the limits of the charter of the said Company, or any other person of the rank in the said Company's service of senior merchant, or of six years' standing in the said service, being respectively appointed to act in the execution of this act by any of the governments of the said Company, in respect of ships or vessels to be there registered :

In territories of East India Company :

The collector of duties at any British possession within the said limits, and not under the government of the said Company, and at which a custom-house is not established, together with the governor, lieutenant-governor, or commander-in-chief of such possession, in respect of ships or vessels to be there registered :

In other places within limits of the charter :

The governor, lieutenant-governor, or commander-in-chief of Malta, Gibraltar, and Cape of Good Hope respectively, in respect of ships or vessels to be there registered :

In Malta, Gibraltar, &c.

Provided always, that no ship or vessel to be registered at Heligoland, except such as is wholly of the built of that place, and that ships or vessels, after having been registered at Malta, Gibraltar, or Heligoland, shall not be registered elsewhere; and that ships or vessels registered at Malta, Gibraltar, or Heligoland, shall not be entitled to the privileges and advantages of British ships in any trade between the said United Kingdom and any of the British possessions

Limitation as to vessels registered at Malta, Gibraltar, or Heligoland.

Certain powers of collectors and controllers, by whom to be exercised in certain cases.

Powers of commissioners of customs in United Kingdom given to governors, &c., abroad.

Ships exercising privileges before registry to be forfeited ;

But not to affect vessels registered under previous act.

What ships are entitled to be registered.

Mediterranean pass may be issued at Malta or Gibraltar for certain ships only.

in America : provided also, that wherever in and by this act it is directed or provided that any act, matter, or thing shall and may be done or performed by, to, or with any collector and controller of his Majesty's customs, the same shall or may be done or performed by, to, or with the several persons respectively hereinbefore authorized and required to make registry, and to grant certificates of registry as aforesaid, and according as the same act, matter, or thing is to be done or performed at the said several and respective places, and within the jurisdiction of the said several persons respectively : provided also, that wherever in and by this act it is directed or provided that any act, matter, or thing shall or may be done or performed by, to, or with the commissioners of his Majesty's customs, the same shall or may be done or performed by, to, or with the governor, lieutenant-governor, or commander-in-chief of any place where any ship or vessel may be registered under the authority of this act, so far as such act, matter, or thing can be applicable to the registering of any ship or vessel at such place.

IV. And be it further enacted, that in case any ship or vessel not being duly registered, and not having obtained such certificate of registry as aforesaid, shall exercise any of the privileges of a British ship, the same shall be subject to forfeiture, and also all the guns, furniture, ammunition, tackle, and apparel to the same ship or vessel belonging, and shall and may be seized by any officer or officers of his Majesty's customs : provided always, that nothing in this act shall extend or be construed to extend to affect the privileges of any ship or vessel which shall prior to the commencement of this act have been registered by virtue of an act passed in the sixth year of the reign of his late Majesty king George the Fourth, intituled, " An Act for the Registering of British Vessels."

V. And be it further enacted, that no ship or vessel shall be registered, or having been registered shall be deemed to be duly registered, by virtue of this act, except such as are wholly of the built of the said United Kingdom, or of the Isle of Man, or of the islands of Guernsey or Jersey, or of some of the colonies, plantations, islands, or territories in Asia, Africa, or America, or of Malta, Gibraltar, or Heligoland, which belong to his Majesty, his heirs, or successors, at the time of the building of such ships or vessels, or such ships or vessels as shall have been condemned in any Court of Admiralty as prize of war, or such ships or vessels as shall have been condemned in any competent court as forfeited for the breach of the laws made for the prevention of the slave trade, and which shall wholly belong, and continue wholly to belong, to his Majesty's subjects, duly entitled to be owners of ships or vessels registered by virtue of this act.

VI. And be it further enacted, that no Mediterranean pass shall be issued for the use of any ship, as being a ship belonging to Malta or Gibraltar, except such as be duly registered at those places respectively, or such as, not being entitled to be so registered, shall have wholly belonged, before the tenth day of October, one thousand eight hundred and twenty-seven, and shall have continued wholly to belong to persons actually residing at those places respectively, as inhabitants thereof, and entitled to be owners of British ships there

registered, or who, not being so entitled, shall have so resided upwards of fifteen years prior to the said tenth day of October, one thousand eight hundred and twenty-seven.

VII. And be it further enacted, that no ship or vessel shall continue to enjoy the privileges of a British ship after the same shall have been repaired in a foreign country, if such repairs shall exceed the sum of twenty shillings for every ton of the burthen of the said ship or vessel, unless such repairs shall have been necessary by reason of extraordinary damage sustained by such ship or vessel during her absence from his Majesty's dominions, to enable her to perform the voyage in which she shall have been engaged, and to return to some port or place in the said dominions; and whenever any ship or vessel which has been so repaired in a foreign country shall arrive at any port in his Majesty's dominions as a British registered ship or vessel, the master or other person having the command or charge of the same shall, upon the first entry thereof, report to the collector and controller of his Majesty's customs at such port that such ship or vessel has been so repaired, under penalty of twenty shillings for every ton of the burthen of such ship or vessel, according to the admeasurement thereof; and if it shall be proved to the satisfaction of the commissioners of his Majesty's customs that such ship or vessel was seaworthy at the time when she last departed from any port or place in his Majesty's dominions, and that no greater quantity of such repairs have been done to the said vessel than was necessary as aforesaid, it shall be lawful for the said commissioners, upon a full consideration of all the circumstances, to direct the collector and controller of the port where such ship or vessel shall have arrived, or where she shall then be, to certify on the certificate of the registry of such ship or vessel that it has been proved to the satisfaction of the commissioners of his Majesty's customs that the privileges of the said ship or vessel have not been forfeited, notwithstanding the repairs which have been done to the same in a foreign country.

VIII. And be it further enacted, that if any ship or vessel registered under the authority of this or any other act shall be deemed or declared to be stranded or unseaworthy, and incapable of being recovered, or repaired to the advantage of the owners thereof, and shall for such reasons be sold by order or decree of any competent court, for the benefit of the owners of such ship or vessel, or other persons interested therein, the same shall be taken and deemed to be a ship or vessel lost or broken up to all intents and purposes, within the meaning of this act, and shall never again be entitled to the privileges of a British-built ship for any purposes of trade or navigation.

IX. And be it further enacted, that no British ship or vessel, which has been or shall hereafter be captured by and become prize to an enemy, or sold to foreigners, shall again be entitled to the privileges of a British ship: Provided always, that nothing contained in this act shall extend to prevent the registering of any ship or vessel whatever which shall afterwards be condemned in any Court of Admiralty as prize of war, or in any competent Court, for breach of laws made for the prevention of the slave trade.

Foreign repairs not to exceed 20s. per ton.

The master on arrival to report such repairs.

Necessity of such repairs to be proved to commissioners of customs.

Ships declared unseaworthy to be deemed ships lost or broken up.

British ships captured not to be again entitled to registry; but ships condemned in Courts of Admiralty may be re-registered.

Ships shall be registered at the port to which they belong.

Commissioners of customs may permit registry at other ports.

Book of registers to be kept, and accounts to be transmitted to commissioners.

Port to which vessels shall be deemed to belong.

Change of subscribing owners to require registry de novo.

If registry de novo cannot be made, ship may go one voyage with permission indorsed on certificate of registry.

Ships built in foreign possessions, for owners resident in United Kingdom may have a certificate from the collector, &c., to trade for two years, or until arrival

X. And be it further enacted, that no such registry shall hereafter be made, or certificate thereof granted, by any person or persons hereinbefore authorized to make such registry and grant such certificate, in any other port or place than the port or place to which such ship or vessel shall properly belong, except so far as relates to such ships or vessels as shall be condemned as prizes in any of the islands of Guernsey, Jersey, or Man, which ships or vessels shall be registered in manner hereinafter directed; but that all and every registry and certificate made and granted in any port or place to which any such ship or vessel does not properly belong shall be utterly null and void to all intents and purposes, unless the officers aforesaid shall be specially authorized and empowered to make such registry and grant such certificate in any other port by an order in writing under the hands of the commissioners of his Majesty's customs, which order the said commissioners are hereby authorized and empowered to issue if they shall see fit; and at every port where registry shall be made in pursuance of this act a book shall be kept by the collector and controller, in which all the particulars contained in the form of the certificate of the registry hereinbefore directed to be used shall be duly entered; and every registry shall be numbered in progression, beginning such progressive numeration at the commencement of each and every year; and such collector and controller shall forthwith, or within one month at the farthest, transmit to the commissioners of his Majesty's customs a true and exact copy, together with the number, of every certificate which shall be by them so granted.

XI. And be it further enacted, that every ship or vessel shall be deemed to belong to some port at or near to which some or one of the owners, who shall make and subscribe the declaration required by this act before registry be made, shall reside; and whenever such owner or owners shall have transferred all his or their share or shares in such ship or vessel, the same shall be registered *de novo* before such ship or vessel shall sail or depart from the port to which she shall then belong, or from any other port which shall be in the same part of the United Kingdom, or the same colony, plantation, island, or territory as the said port shall be in: provided always, that if the owner or owners of such ship or vessel cannot in sufficient time comply with the requisites of this act, so that registry may be made before it shall be necessary for such ship or vessel to sail or depart upon another voyage, it shall be lawful for the collector and controller of the port where such ship or vessel may then be to certify upon the back of the existing certificate of registry of such ship or vessel, that the same is to remain in force for the voyage upon which the said ship or vessel is then about to sail or depart: provided also, that if any ship or vessel shall be built in any of the colonies, plantations, islands, or territories in Asia, Africa, or America, to his Majesty belonging, for owners residing in the United Kingdom, and the master of such ship or vessel, or the agent for the owner or owners thereof, shall have produced to the collector and controller of the port at or near to which such ship or vessel was built, the certificate of the builder required by this act, and shall have made and subscribed a declaration before such collector and controller of the names and descriptions of the principal owners of such

ship or vessel, and that she is the identical ship or vessel mentioned in such certificate of the builder, and that no foreigner, to the best of his knowledge and belief, has any interest therein; the collector and controller of such port shall cause such ship or vessel to be surveyed and measured in like manner as is directed for the purpose of registering any ship or vessel, and shall give the master of such ship or vessel a certificate under their hands and seals, purporting to be under the authority of this act, and stating when and where and by whom such ship or vessel was built, the description, tonnage, and other particulars required on registry of any ship or vessel, and such certificate shall have all the force and virtue of a certificate of registry under this act, during the term of two years, unless such ship shall sooner arrive at some place in the United Kingdom; and such collector and controller shall transmit a copy of such certificate to the commissioners of his Majesty's customs.

XII. And be it further enacted, that no person who has taken the oath of allegiance to any foreign state, except under the terms of some capitulation, unless he shall afterwards become a denizen or naturalized subject of the United Kingdom by his Majesty's letters patent, or by act of Parliament, nor any person usually residing in any country not under the dominion of his Majesty, his heirs, and successors, unless he be a member of some British factory, or agent for, or partner in, any house or copartnership actually carrying on trade in Great Britain or Ireland, shall be entitled to be the owner, in whole or in part, directly or indirectly, of any ship or vessel required and authorized to be registered by virtue of this act; save and except that it shall be lawful for any person who was a member of the company of merchants trading to the Levant seas at the time of its dissolution, and who was a resident at any of the factories of the said company, to continue to hold any share or shares in any British registered ship of which at the time of such residence he was an owner or part-owner, although such person shall continue to reside at any of the places where such factories had existed prior to the dissolution of the said company.

XIII. And be it further enacted, that no registry shall henceforth be made or certificate granted until the following declaration be made and subscribed, before the person or persons hereinbefore authorized to make such registry and grant such certificate respectively, by the owner of such ship or vessel if such ship or vessel is owned by or belongs to one person only, or in case there shall be two joint owners, then by both of such joint owners, if both shall be resident within twenty miles of the port or place where such registry is required, or by one of such owners if one or both of them shall be resident at a greater distance from such port or place; or if the number of such owners or proprietors shall exceed two, then by the greater part of the number of such owners or proprietors if the greater number of them shall be resident within twenty miles of such port or place as aforesaid, not in any case exceeding three of such owners or proprietors, unless a greater number shall be desirous to join in making and subscribing the said declaration, or by one of such owners if all, or all except one, shall be resident at a greater distance:

in United Kingdom.

Persons residing in foreign countries may not be owners, unless members of British factories, or agents for or partners in British houses, or member of merchants trading to Levant seas.

Declaration to be made by subscribing owners previous to registry.

Proportion of owners who shall subscribe and take the declaration.

Form of declaration.

" I *A. B.* of [*place of residence and occupation*] do truly declare, that the ship or vessel [*name*] of [*port or place*], whereof [*master's name*] is at present master, being [*kind of built, burthen, et cætera, as described in the certificate of the surveying officer*], was [*when and where built, or, if prize or forfeited, capture and condemnation as such*], and that I the said *A. B.* [*and the other owners, names and occupations, if any, and where they respectively reside, videlicet, town, place, or parish, and county, or if member of and resident in any factory in foreign parts, or in any foreign town or city, being an agent for or partner in any house or copartnership actually carrying on trade in Great Britain or Ireland, the name of such factory, foreign town, or city, and the names of such house or copartnership*] am [*or are*] sole owner [*or owners*] of the said vessel, and that no other person or persons whatever hath or have any right, title, interest, share, or property therein or thereto; and that I the said *A. B.* [*and the said other owners, if any*] am [*or are*] truly and *bond fide* a subject [*or subjects*] of Great Britain; and that I the said *A. B.* have not [*nor have any of the other owners, to the best of my knowledge and belief*] taken the oath of allegiance to any foreign state whatever [*except under the terms of some capitulation, describing the particulars thereof*], or that since my taking [*or his or their taking*] the oath of allegiance to [*naming the foreign states respectively to which he or any of the said owners shall have taken the same*] I have [*or he or they hath or have*] become a denizen [*or denizens, or naturalized subject or subjects, as the case may be*] of the United Kingdom of Great Britain and Ireland, by his Majesty's letters patent, or by an act of Parliament [*naming the times when such letters of denization have been granted respectively, or the year or years in which such act or acts for naturalization have passed respectively;*] and that no foreigner, directly or indirectly, hath any share or part interest in the said ship or vessel."

Provided always, that if it shall become necessary to register any ship or vessel belonging to any corporate body in the United Kingdom, the following declaration, in lieu of the declaration hereinbefore directed, shall be taken and subscribed by the secretary, or other proper officer of such corporate body, that is to say,

" I *A. B.* secretary or officer of [*name of company or corporation*] do truly declare, that the ship or vessel [*name*] of [*port*] whereof [*master's name*] is at present master, being [*kind of built, burthen, et cætera, as described in the certificate of the surveying officer*], was [*when and where built, or, if prize or forfeited, capture and condemnation as such*], and that the same doth wholly and truly belong to [*name of company or corporation.*]"

Addition to declaration in case the required number of owners do not attend.

XIV. And be it further enacted, that in case the required number of joint owners or proprietors of any ship or vessel shall not personally attend to make and subscribe the declaration hereinbefore directed to be made and subscribed, then and in such case such owner or owners, proprietor or proprietors, as shall personally attend and make and subscribe the declaration aforesaid, shall further declare that the part-owner or part-owners of such ship or vessel then absent is or are not resident within twenty miles of such port or

place, and hath or have not, to the best of his or their knowledge or belief, wilfully absented himself or themselves, in order to avoid the making the declaration hereinbefore directed to be made and subscribed, or is or are prevented by illness from attending to make and subscribe the said declaration.

XV. And in order to enable the collector and contrroller of his Majesty's customs to grant a certificate truly and accurately describing every ship or vessel to be registered in pursuance of this act, and also to enable all other officers of his Majesty's customs, on due examination, to discover whether any such ship or vessel is the same with that for which a certificate is alleged to have been granted; be it enacted, that previous to the registering or granting of any certificate of registry as aforesaid some one or more person or persons appointed by the commissioners of his Majesty's customs (taking to his or their assistance, if he or they shall judge it necessary, one or more person or persons skilled in the building and admeasurement of ships,) shall go on board of every such ship or vessel as is to be registered, and shall strictly and accurately examine and admeasure every such ship or vessel as to all and every particular contained in the form of the certificate hereinbefore directed, in the presence of the master, or of any other person who shall be appointed for that purpose on the part of the owner or owners; or in his or their absence by the said master; and shall deliver a true and just account in writing of all such particulars of the built, description, and admeasurement of every such ship or vessel as are specified in the form of the certificate above recited to the collector and contrroller authorized as aforesaid to make such registry and grant such certificate of registry; and the said master or other person attending on the part of the owner or owners is hereby required to sign his name also to the certificate of such surveying or examining officer, in testimony of the truth thereof, provided such master or other person shall consent and agree to the several particulars set forth and described therein.

Vessels to be surveyed previous to registry.

Certificate of survey to be given;

Owner or master concurring therein.

XVI. And be it further enacted, that for the purpose of ascertaining the tonnage of ships or vessels the rule for admeasurement shall be as follows, that is to say, the length shall be taken on a straight line along the rabbet of the keel, from the back of the main stern-post to a perpendicular line from the fore part of the main stem under the bowsprit, from which subtracting three-fifths of the breadth, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from the outside of the outside plank in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of doubling planks that may be wrought upon the sides of the ship; then multiplying the length of the keel by the breadth so taken, and that product by half the breadth, and dividing the whole by ninety-four, the quotient shall be deemed the true contents of the tonnage.

Mode of admeasurement to ascertain tonnage.

XVII. And whereas it would in some cases endanger ships or vessels to cause them to be laid on shore; be it therefore enacted, that in cases where it may be necessary to ascertain the tonnage of any ship or vessel when afloat, according to the foregoing rule, the

Mode of ascertaining tonnage when vessels are afloat.

following method shall be observed, that is to say, drop a plumb-line over the stern of the ship, and measure the distance between such line and the after part of the stern-post at the load water-mark, then measure from the top of the plumb-line, in a parallel direction with the water, to a perpendicular point immediately over the load water-mark at the fore part of the main stem, subtracting from such measurement the above distance, the remainder will be the ship's extreme, from which is to be deducted three inches for every foot of the load draught of water for the rake abaft, also three-fifths of the ship's breadth for the rake forward, the remainder shall be esteemed the just length of the keel to find the tonnage; and the breadth shall be taken from outside to outside of the plank in the broadest part of the ship, whether that shall be above or below the main wales, exclusive of all manner of sheathing or doubling that may be wrought on the side of the ship; then multiplying the length of the keel for tonnage by the breadth so taken, and that product by half the breadth, and dividing by ninety-four, the quotient shall be deemed the true contents of the tonnage.

Engine room
in steam-ves-
sels to be
deducted.

XVIII. Provided always, and be it further enacted, that in each of the several rules hereinbefore prescribed, when used for the purpose of ascertaining the tonnage of any ship or vessel propelled by steam, the length of the engine room shall be deducted from the whole length of such ship or vessel, and the remainder shall, for such purpose, be deemed the whole length of the same.

Tonnage when
so ascertained
to be ever after
deemed the
tonnage.

XIX. And be it further enacted, that whenever the tonnage of any ship or vessel shall have been ascertained according to the rule herein prescribed (except in the case of ships or vessels which have been admeasured afloat), such account of tonnage shall ever after be deemed the tonnage of such ship or vessel, and shall be repeated in every subsequent registry of such ship or vessel, unless it shall happen that any alteration has been made in the form and burthen of such ship or vessel, or it shall be discovered that the tonnage of such ship or vessel had been erroneously taken and computed.

Bond to be
given at the
time of re-
gistry.

XX. And be it further enacted, that at the time of the obtaining of the certificate of registry as aforesaid sufficient security by bond shall be given to his Majesty, his heirs and successors, by the master and such of the owners as shall personally attend, as is herein-before required, such security to be approved of and taken by the person or persons herein-before authorized to make such registry and grant such certificate of registry at the port or place in which such certificate shall be granted, in the penalties following: (that is to say,) if such ship or vessel shall be a decked vessel, or be above the burthen of fifteen tons and not exceeding fifty tons, then in the penalty of one hundred pounds; if exceeding the burthen of fifty tons and not exceeding one hundred tons, then in the penalty of three hundred pounds; if exceeding the burthen of one hundred tons and not exceeding two hundred tons, then in the penalty of five hundred pounds; if exceeding the burthen of two hundred tons and not exceeding three hundred tons, then in the penalty of eight hundred pounds; and if exceeding the burthen of three hundred tons, then in the penalty of one thousand pounds; and the condition of every such bond shall be, that such certificate shall not be sold, lent, or other-

wise disposed of to any person or persons whatever, and that the same shall be solely made use of for the service of the ship or vessel for which it is granted; and that in case such ship or vessel shall be lost, or taken by the enemy, burnt, or broken up, or otherwise prevented from returning to the port to which she belongs, or shall on any account have lost and forfeited the privileges of a British ship, or shall have been seized and legally condemned for illicit trading, or shall have been taken in execution for debt and sold by due process of law, or shall have been sold to the Crown, or shall under any circumstances have been registered *de novo*, the certificate, if preserved, shall be delivered up, within one month after the arrival of the master in any port or place in his Majesty's dominions, to the collector and controller of some port in Great Britain, or of the Isle of Man, or of the British plantations, or to the governor, lieutenant-governor, or commander-in-chief for the time being of the islands of Guernsey or Jersey: and that if any foreigner, or any person or persons for the use and benefit of any foreigner, shall purchase or otherwise become entitled to the whole or to any part or share of or any interest in such ship or vessel, and the same shall be within the limits of any port of Great Britain, or of the islands of Guernsey, Jersey, or Man, or of the British colonies, plantations, islands, or territories aforesaid, then and in such case the certificate of registry shall, within seven days after such purchase or transfer of property in such ship or vessel, be delivered up to the person or persons herein-before authorized to make registry and grant certificate of registry at such port or place respectively as aforesaid; and if such ship or vessel shall be in any foreign port when such purchase or transfer of property shall take place, then that the certificate shall be delivered up to the British Consul or other chief British officer resident at or nearest to such foreign port; or if such ship or vessel shall be at sea when such purchase or transfer of property shall take place, then that the certificate shall be delivered up to the British consul or other chief British officer at the foreign port or place in or at which the master or other person having or taking the charge or command of such ship or vessel shall first arrive after such purchase or transfer of property at sea, immediately after his arrival at such foreign port; but if such master or other person who had the command thereof at the time of such purchase or transfer of property at sea shall not arrive at a foreign port, but shall arrive at some port of Great Britain, or of the islands of Guernsey, Jersey, or Man, or of his Majesty's said colonies, plantations, islands, or territories, then that the certificate shall be delivered up, in manner aforesaid, within fourteen days after the arrival of such ship or vessel, or of the person who had the command thereof, in any port of Great Britain, or of the islands of Guernsey, Jersey, or Man, or of any of his Majesty's said colonies, plantations, islands, or territories: provided always, that if it shall happen that at the time of registry of any ship or vessel the same shall be at any other port than the port to which she belongs, so that the master of such ship or vessel cannot attend at the port of registry to join with the owner or owners in such bond as aforesaid, it shall be lawful for him to give a separate bond, to the like effect, at the port where such ship or vessel may then be, and the collector

Conditions that the certificate shall be solely made use of for the service of the vessel, or given up to be cancelled in certain cases.

If ship at the time of registry be at any other port than that of registry, the master may there give bond.

and controller of such other port shall transmit such bond to the collector and controller of the port where such ship or vessel is to be registered, and such bond, and the bond also given by the owner or owners, shall together be of the same effect against the master and owner or owners, or either of them, as if they had bound themselves jointly and severally in one bond.

When master is changed, new master to give similar bond, and his name to be indorsed on certificate of registry.

XXI. And be it further enacted, that when and so often as the master or other person having or taking the charge or command of any ship or vessel registered in manner herein-before directed shall be changed, the master or owner of such ship or vessel shall deliver to the person or persons herein-before authorized to make such registry and grant such certificates of registry at the port where such change shall take place the certificate of registry belonging to such ship or vessel, who shall thereupon indorse and subscribe a memorandum of such change, and shall forthwith give notice of the same to the proper officer of the port or place where such ship or vessel was last registered pursuant to this act, who shall likewise make a memorandum of the same in the book of registers which is hereby directed and required to be kept, and shall forthwith give notice thereof, to the commissioners of his Majesty's customs: provided always, that before the name of such new master shall be indorsed on the certificate of registry he shall be required to give and shall give a bond in the like penalties and under the same conditions as are contained in the bond herein-before required to be given at the time of registry of any ship or vessel.

Bonds liable to same duties of stamps as bonds for customs.

XXII. And be it further enacted, that all bonds required by this act shall be liable to the same duties of stamps as bonds given for or in respect of the duties of customs are or shall be liable to under any act for the time being in force for granting duties of stamps.

Certificate of registry to be given up by all persons as directed by the bond.

XXIII. And be it further enacted, that if any person whatever shall at any time have possession of and wilfully detain any certificate of registry granted under this or any other act, which ought to be delivered up to be cancelled according to any of the conditions of the bond herein-before required to be given upon the registry of any ship or vessel, such person is hereby required and enjoined to deliver up such certificate of registry in manner directed by the conditions of such bond in the respective cases and under the respective penalties therein provided.

Name of vessel which has been registered never afterwards to be changed, and to be painted on the stern.

XXIV. And be it further enacted, that it shall not be lawful for any owner or owners of any ship or vessel to give any name to such ship or vessel other than that by which she was first registered in pursuance of this or any other act; and that the owner or owners of all and every ship or vessel which shall be so registered shall, before such ship or vessel, after such registry, shall begin to take in any cargo, paint or cause to be painted, in white or yellow letters, of a length of not less than four inches, upon a black ground, on some conspicuous part of the stern, the name by which such ship or vessel shall have been registered pursuant to this act, and the port to which she belongs, in a distinct and legible manner, and shall so keep and preserve the same; and that if such owner or owners or master or other person having or taking the charge or command of such ship or vessel shall permit such ship or vessel to begin to take in any

Penalty for omission, 100*l*.

cargo before the name of such ship or vessel has been so painted as aforesaid, or shall wilfully alter, erase, obliterate, or in anywise hide or conceal, or cause or procure or permit the same to be done (unless in the case of square-rigged vessels in time of war), or shall in any written or printed paper, or other document, describe such ship or vessel by any name other than that by which she was first registered pursuant to this act, or shall verbally describe, or cause or procure or permit such ship or vessel to be described, by any other name to any officer or officers of his Majesty's revenue in the due execution of his or their duty, then and in every such case such owner or owners or master or other person having or taking the charge or command of such ship or vessel shall forfeit the sum of one hundred pounds.

XXV. And be it further enacted, that all and every person and persons who shall apply for a certificate of the registry of any ship or vessel shall and they are hereby required to produce to the person or persons authorized to grant such certificate a true and full account under the hand of the builder of such ship or vessel, of the proper denomination, and of the time when and the place where such ship or vessel was built, and also an exact account of the tonnage of such ship or vessel, together with the name of the first purchaser or purchasers thereof (which account such builder is hereby directed and required to give under his hand on the same being demanded by such person or persons so applying for a certificate as aforesaid), and shall also make and subscribe a declaration before the person or persons herein-before authorized to grant such certificate that the ship or vessel for which such certificate is required is the same with that which is so described by the builder as aforesaid.

XXVI. And be it further enacted, that if the certificate of registry of any ship or vessel shall be lost or mislaid, so that the same cannot be found or obtained for the use of such ship or vessel when needful, and proof thereof shall be made to the satisfaction of the commissioners of his Majesty's customs, such commissioners shall and may permit such ship or vessel to be registered *de novo*, and a certificate thereof to be granted : provided always, that if such ship or vessel be absent and far distant from the port to which she belongs, or by reason of the absence of the owner or owners, or of any other impediment, registry of the same cannot then be made in sufficient time, such commissioners shall and may grant a license for the present use of such ship or vessel, which license shall, for the time and to the extent specified therein, and no longer be of the same force and virtue as a certificate of registry granted under this act : provided always, that before such registry *de novo* be made the owner or owners and master shall give bond to the commissioners aforesaid in such sum as to them shall seem fit, with a condition that if the certificate of registry shall at any time afterwards be found the same shall be forthwith delivered to the proper officers of his Majesty's customs to be cancelled, and that no illegal use has been or shall be made thereof with his or their privity or knowledge ; and further, that before any such license shall be granted as aforesaid the master of such ship or vessel shall also make and subscribe a declaration that the same has been registered as a British ship, naming the

Builder's certificate of particulars of ship.

Declaration to be made thereto.

Certificate of registry lost or mislaid ;

Commissioners may permit registry *de novo* ; or grant a license.

Bond respecting lost certificate of registry : Condition.

Declaration to be made before license be granted.

Before license
be granted
ship to be sur-
veyed as if for
registry ;

and registry
may be made
after departure
of the ship ;

* and certificate
transmitted to
be exchanged
for the license.

Persons de-
taining certi-
cate of registry
to forfeit 100*l*.

port where and the time when such registry was made, and all the particulars contained in the certificate thereof, to the best of his knowledge and belief, and shall also give such bond and with the same condition as is before mentioned : provided also, that before any such license shall be granted such ship or vessel shall be surveyed in like manner as if a registry *de novo* were about to be made thereof; and the certificate of such survey shall be preserved by the collector and controller of the port to which such ship or vessel shall belong ; and in virtue thereof it shall be lawful for the said commissioners and they are hereby required to permit such ship or vessel to be registered after her departure, whenever the owner or owners shall personally attend to take and subscribe the declaration required by this act before registry be made, and shall also comply with all other requisites of this act, except so far as relates to the bond to be given by the master of such ship or vessel ; which certificate of registry the said commissioners shall and may transmit to the collector and controller of any other port, to be by them given to the master of such ship or vessel, upon his giving such bond, and delivering up the license which had been granted for the then present use of such ship or vessel].

XXVII. And whereas it is not proper that any person, under any pretence whatever, should detain the certificate of registry of any ship or vessel, or hold the same for any purpose other than the lawful use and navigation of the ship or vessel for which it was granted ; be it therefore enacted, that in case any person who shall have received or obtained by any means or for any purpose whatever the certificate of the registry of any ship or vessel (whether such person shall claim to be the master or to be the owner or one of the owners of such ship or vessel, or not,) shall wilfully detain and refuse to deliver up the same to the proper officers of his Majesty's customs, for the purposes of such ship or vessel, as occasion shall require, or to the person or persons having the actual command, possession, and management of such ship or vessel as the ostensible and reputed master, or as the ostensible and reputed owner or owners thereof, it may and shall be lawful to and for any such last-mentioned person to make complaint on oath of such detainer and refusal to any justice of the peace residing near to the place where such detainer and refusal shall be in Great Britain or Ireland, or to any member of the supreme court of justice, or any justice of the peace in the islands of Jersey, Guernsey, or Man, or in any colony, plantation, island, or territory to his Majesty belonging in Asia, Africa, or America, or in Malta, Gibraltar, or Heligoland, where such detainer and refusal shall be in any of the places last mentioned ; and on such complaint the said justice or other magistrate shall and is hereby required, by warrant under his hand and seal, to cause the person so complained against to be brought before him to be examined touching such detainer and refusal ; and if it shall appear to the said justice or other magistrate, on examination of such person or otherwise, that the said certificate of registry is not lost or mislaid, but is wilfully detained by the said person, such person shall be thereof convicted, and shall forfeit and pay the sum of one hundred pounds, and on failure of payment thereof he shall be committed to the common gaol, there to remain

without bail or mainprize for such time as the said justice or other magistrate shall in his discretion deem proper, not being less than three months nor more than twelve months; and the said justice or other magistrate shall and he is hereby required to certify the aforesaid detainer, refusal, and conviction to the person or persons who granted such certificate of registry for such ship or vessel, who shall, on the terms and conditions of law being complied with, make registry of such ship or vessel *de novo*, and grant a certificate thereof conformably to law, notifying on the back of such certificate the ground upon which the ship or vessel was so registered *de novo*; and if the person who shall have detained and refused to deliver up such certificate of registry as aforesaid, or shall be verily believed to have detained the same, shall have absconded, so that the said warrant of the justice or other magistrate cannot be executed upon him, and proof thereof shall be made to the satisfaction of the commissioners of his Majesty's customs, it shall be lawful for the said commissioners to permit such ship or vessel to be registered *de novo*, or otherwise, in their discretion, to grant a licence for the present use of such ship or vessel in like manner as is hereinbefore provided in the case wherein the certificate of registry is lost or mislaid.

Justice to certify detainer, and ship to be registered *de novo*.

If person detaining certificate have absconded, ship may be re-registered as in case of lost certificate.

XXVIII. And be it further enacted, that if any ship or vessel, after she shall have been registered pursuant to the directions of this act, shall in any manner whatever be altered so as not to correspond with all the particulars contained in the certificate of her registry, in such case such ship or vessel shall be registered *de novo*, in manner herein-before required, as soon as she returns to the port to which she belongs, or to any other port which shall be in the same part of the United Kingdom, or in the same colony, plantation, island, or territory, as the said port shall be in, on failure whereof such ship or vessel shall to all intents and purposes be considered and deemed and taken to be a ship or vessel not duly registered.

Ship altered in certain manner to be registered *de novo*.

XXIX. And be it further enacted, that the owner or owners of all such ships and vessels as shall be taken by any of his Majesty's ships or vessels of war, or by any private or other ship or vessel, and condemned as lawful prize in any court of admiralty, or of such ships or vessels as shall be condemned in any competent court as forfeited for breach of the laws for the prevention of the slave trade, shall, for the purpose of registering any such ship or vessel, produce to the collector and controller of his Majesty's customs a certificate of the condemnation of such ship or vessel, under the hand and seal of the judge of the court in which such ship or vessel shall have been condemned (which certificate such judge is hereby authorized and required to grant), and also a true and exact account in writing of all the particulars contained in the certificate hereinbefore set forth, to be made and subscribed by one or more skilful person or persons to be appointed by the court then and there to survey such ship or vessel, and shall also make and subscribe a declaration before the collector and controller that such ship or vessel is the same vessel which is mentioned in the certificate of the judge aforesaid.

Vessels condemned as prize, or for breach of laws against slave trade, certificate of condemnation to be produced.

XXX. Provided always, and be it further enacted, that no ship or vessel which shall be taken and condemned as prize or forfeiture as

Prize vessels not be regis-

tered at
Guernsey,
Jersey, or
Man; but at
certain ports.

Transfers of
interest to be
made by bill of
sale;

reciting certi-
cate of regis-
try.

Bill of sale not
void by unin-
portant error of
recital, &c.

Property in
ships to be
divided into
sixty-four parts
or shares.

Declaration
upon first re-
gistry to state
the number of
such shares
held by each
owner.

Smaller por-
tions may be
conveyed with-
out stamp.

Partners may
hold ships or
shares without
distinguishing
proportionate
interest of each
owner.

aforesaid shall be registered in the islands of Guernsey, Jersey, or Man, although belonging to his Majesty's subjects residing in those islands, or in some one or other of them; but the same shall be registered either at Southampton, Weymouth, Exeter, Plymouth, Falmouth, Liverpool, or Whitehaven, by the collector and controller at such ports respectively, who are hereby authorized and required to register such ship or vessel, and to grant a certificate thereof in the form and under the regulations and restrictions in this act contained.

XXXI. And be it further enacted, that when and so often as the property in any ship or vessel, or any part thereof, belonging to any of his Majesty's subjects, shall, after registry thereof, be sold to any other or others of his Majesty's subjects, the same shall be transferred by bill of sale or other instrument in writing, containing a recital of the certificate of registry of such ship or vessel, or the principal contents thereof, otherwise such transfer shall not be valid or effectual for any purpose whatever, either in law or in equity: provided always, that no bill of sale shall be deemed void by reason of any error in such recital, or by the recital of any former certificate of registry instead of the existing certificate, provided the identity of the ship or vessel intended in the recital be effectually proved thereby.

XXXII. And be it further enacted, that the property in every ship or vessel of which there are more than one owner shall be taken and considered to be divided into sixty-four equal parts or shares, and the proportion held by each owner shall be described in the registry as being a certain number of sixty-fourth parts or shares; and that no person shall be entitled to be registered as an owner of any ship or vessel in respect of any proportion of such ship or vessel which shall not be an integral sixty-fourth part or share of the same; and upon the first registry of any ship or vessel the owner or owners who shall take and subscribe the declaration required by this act before registry be made shall also declare the number of such parts or shares then held by each owner, and the same shall be so registered accordingly: provided always, that if it shall at any time happen that the property of any owner or owners in any ship or vessel cannot be reduced by division into any number of integral sixty-fourth parts or shares, it shall and may be lawful for the owner or owners of such fractional parts as shall be over and above such number of integral sixty-fourth parts or shares into which such property in any ship or vessel can be reduced by division to transfer the same one to another, or jointly to any new owner, by memorandum upon their respective bills of sale, or by fresh bill of sale, without such transfer being liable to any stamp duty: provided also, that the right of any owner or owners to any such fractional parts shall not be affected by reason of the same not having been registered: provided also, that it shall be lawful for any number of such owners, named and described in such registry, being partners in any house or copartnership actually carrying on trade in any part of his Majesty's dominions, to hold any ship or vessel, or any share or shares of any ship or vessel, in the name of such house or copartnership, as joint owners thereof, without distinguishing the proportionate interest of each of such owners, and that such ship or vessel or the share or

shares thereof so held in copartnership shall be deemed and taken to be partnership property to all intents and purposes, and shall be governed by the same rules, both in law and equity, as relate to and govern all other partnership property in any other goods, chattels, and effects whatsoever.

XXXIII. And be it further enacted, that no greater number than thirty-two persons shall be entitled to be legal owners at one and the same time of any ship or vessel, as tenants in common, or to be registered as such: provided always, that nothing herein contained shall affect the equitable title of minors, heirs, legatees, creditors, or others, exceeding that number, duly represented by or holding from any of the persons within the said number, registered as legal owners of any share or shares of such ship or vessel: provided also, that if it shall be proved to the satisfaction of the commissioners of his Majesty's customs that any number of persons have associated themselves as a joint stock company, for the purpose of owning any ship or vessel, or any number of ships or vessels, as the joint property of such company, and that such company have duly elected or appointed any number, not less than three, of the members of the same to be trustees of the property in such ship or vessel or ships or vessels so owned by such company, it shall be lawful for such trustees or any three of them, with the permission of such commissioners, to make and subscribe the declaration required by this act before registry be made, except that instead of stating therein the names and descriptions of the other owners, they shall state the name and description of the company to which such ship or vessel or ships or vessels shall in such manner belong.

XXXIV. And be it further enacted, that no bill of sale or other instrument in writing shall be valid and effectual to pass the property in any ship or vessel, or in any share thereof, or for any other purpose, until such bill of sale or other instrument in writing shall have been produced to the collector and controller of the port at which such ship or vessel is already registered, or to the collector and controller of any other port at which she is about to be registered *de novo*, as the case may be, nor until such collector and controller respectively shall have entered in the book of such last registry, in the one case, or in the book of such registry *de novo*, after all the requisites of law for such registry *de novo* shall have been duly complied with, in the other case, (and which they are respectively hereby required to do upon the production of the bill of sale or other instrument for that purpose,) the name, residence, and description of the vendor or mortgagor, or of each vendor or mortgagor, if more than one, the number of shares transferred, the name, residence, and description of the purchaser or mortgagee, or of each purchaser or mortgagee, if more than one, and the date of the bill of sale or other instrument, and of the production of it; and further, if such ship or vessel is not about to be registered *de novo*, the collector and controller of the port where such ship is registered shall and they are hereby required to indorse the aforesaid particulars of such bill of sale or other instrument on the certificate of registry of the said ship or vessel, when the same shall be produced to them for that purpose, in manner and to the effect following; *videlicet*,

Only thirty-two persons to be owners of any ship at one time.

Not to affect the equitable title of heirs, &c.

Joint stock companies.

Trustees may apply to have registry made.

Bills of sale not effectual until produced to officers of customs, and entered in the book of registry or intended registry.

form of indorsement.

' Custom House [port and date ; name, residence, and description of vendor or mortgagor] has transferred by [bill of sale or other instrument] dated [date, number of shares] to [name, residence, and description of purchaser or mortgagee.]

' A. B. Collector.

' C. D. Controller.'

Notice to commissioners.

And forthwith to give notice thereof to the commissioners of customs ; and in case the collector and controller shall be desired so to do, and the bill of sale or other instrument shall be produced to them for that purpose, then the said collector and controller are hereby required to certify, by indorsement upon the bill of sale or other instrument, that the particulars before mentioned have been so entered in the book of registry, and indorsed upon the certificate of registry as aforesaid.

Entry of bill of sale to be valid, except in certain cases.

XXXV. And be it further enacted, that when and so soon as the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the said bill of sale or other instrument shall be valid and effectual to pass the property thereby intended to be transferred as against all and every person and persons whatsoever, and to all intents and purposes, except as against such subsequent purchasers and mortgagees who shall first procure the indorsement to be made upon the certificate of registry of such ship or vessel in manner herein-after mentioned.

When a bill of sale has been entered for any shares, thirty days shall be allowed for indorsing the certificate of registry, before any other bill of sale for the same shall be entered.

XXXVI. And be it further enacted, that when and after the particulars of any bill of sale or other instrument by which any ship or vessel, or any share or shares thereof, shall be transferred, shall have been so entered in the book of registry as aforesaid, the collector and controller shall not enter in the book of registry the particulars of any other bill of sale or instrument purporting to be a transfer by the same vendor or mortgagor or vendors or mortgagors of the same ship or vessel, share or shares thereof, to any other person or persons, unless thirty days shall elapse from the day on which the particulars of the former bill of sale or other instrument were entered in the book of registry ; or in case the ship or vessel was absent from the port to which she belonged at the time when the particulars of such former bill of sale or other instrument were entered in the book of registry, then unless thirty days shall have elapsed from the day on which the ship or vessel arrived at the port to which the same belonged ; and in case the particulars of two or more such bills of sale or other instruments as aforesaid shall at any time have been entered in the book of registry of the said ship or vessel, the collector and controller shall not enter in the book of registry the particulars of any other bill of sale or other instrument as aforesaid unless thirty days shall in like manner have elapsed from the day on which the particulars of the last of such bill of sale or other instrument were entered in the books of registry, or from the day on which the ship or vessel arrived at the port to which she belonged, in case of her absence as aforesaid ; and in every case where there shall at any time happen to be two or more transfers by the same owner or owners of the same property in any ship or vessel entered in the book of registry as aforesaid, the collector and con-

troller are hereby required to indorse upon the certificate of registry of such ship or vessel the particulars of that bill of sale or other instrument under which the person or persons claims or claim property who shall produce the certificate of registry for that purpose within thirty days next after the entry of his said bill of sale or other instrument in the book of registry as aforesaid, or within thirty days next after the return of the said ship or vessel to the port to which she belongs, in case of her absence at the time of such entry as aforesaid; and in case no person or persons shall produce the certificate of registry within either of the said spaces of thirty days, then it shall be lawful for the collector and controller, and they are hereby required, to indorse upon the certificate of registry the particulars of the bill of sale or other instrument to such person or persons as shall first produce the certificate of registry for that purpose, it being the true intent and meaning of this act that the several purchasers and mortgagees of such ship or vessel, share or shares thereof, when more than one appear to claim the same property, or to claim security on the same property, in the same rank and degree, shall have priority one over the other, not according to the respective times when the particulars of the bill of sale or other instrument by which such property was transferred to them were entered in the book of registry as aforesaid, but according to the time when the indorsement is made upon the certificate of registry as aforesaid: provided always, that if the certificate of registry shall be lost or mislaid, or shall be detained by any person whatever, so that the indorsement cannot in due time be made thereon, and proof thereof shall be made by the purchaser or mortgagee, or his known agent, to the satisfaction of the commissioners of his Majesty's customs, it shall be lawful for the said commissioners to grant such further time as to them shall appear necessary for the recovery of the certificate of registry, or for the registry *de novo* of the said ship or vessel under the provisions of this act, and thereupon the collector and controller shall make a memorandum in the book of registers of the further time so granted, and during such time no other bill of sale shall be entered for the transfer of the same ship or vessel, or the same share or shares thereof, or for giving the same security thereon.

XXXVII. And be it further enacted, that if the certificate of registry of such ship or vessel shall be produced to the collector and controller of any port where she may then be, after any such bill of sale shall have been recorded at the port to which she belongs, together with such bill of sale, containing a notification of such record, signed by the collector and controller of such port as before directed, it shall be lawful for the collector and controller of such other port to indorse on such certificate of registry (being required so to do) the transfer mentioned in such bill of sale, and such collector and controller shall give notice thereof to the collector and controller of the port to which such ship or vessel belongs, who shall record the same in like manner as if they had made such indorsement themselves, but inserting the name of the port at which such indorsement was made: provided always, that the collector and controller of such other port shall first give notice to the collector and controller of the port to which such ship or vessel belongs of such

Nature of the priority intended in this act.

Provision in case certificate be mislaid.

Bills of sale may be produced after entry at other ports than those to which vessels belong, and transfers indorsed on certificate of registry.

Previous notice to be given to officers at the

port of
registry.

requisition made to them to indorse the certificate of registry, and the collector and controller of the port to which such ship or vessel belongs shall thereupon send information to the collector and controller of such other port, whether any and what other bill or bills of sale have been recorded in the book of the registry of such ship or vessel; and the collector and controller of such other port having such information shall proceed in manner directed by this act in all respects to the indorsing of the certificate of registry as they would do if such port were the port to which such vessel belonged.

If upon regis-
try *de novo*
any bill of sale
shall not have
been recorded,
the same
shall then
be produced.

XXXVIII. And be it further enacted, that if it shall become necessary to register any ship or vessel *de novo*, and any share or shares of such ship or vessel shall have been sold since she was last registered, and the transfer of such share or shares shall not have been recorded and indorsed in manner herein-before directed, the bill of sale thereof shall be produced to the collector and controller of his Majesty's customs, who are to make registry of such ship or vessel, otherwise such sale shall not be noticed in such registry *de novo*, except as herein-after excepted: provided always, that upon the future production of such bill of sale, and of the existing certificate of registry, such transfer shall and may be recorded and indorsed as well after such registry *de novo* as before.

Bill of sale pre-
vious to regis-
try may be
recorded after
registry.

Upon change
of property
registry *de
novo* may be
granted if de-
sired, although
not required by
law.

XXXIX. And be it further enacted, that if upon any change of property in any ship or vessel the owner or owners shall desire to have the same registered *de novo*, although not required by this act, and the owner or proper number of owners shall attend at the custom house at the port to which such ship or vessel belongs for that purpose, it shall be lawful for the collector and controller of his Majesty's customs at such port to make registry *de novo* of such ship or vessel at the same port, and to grant a certificate thereof, the several requisites herein-before in this act mentioned and directed being first duly observed and complied with.

Copies of de-
clarations, &c.,
and of extracts
from books of
registry admit-
ted in evi-
dence.

XL. And whereas great inconvenience hath arisen from the registering officers being served with subpoenas requiring them to bring with them and produce, on trials in courts of law relative to the ownery of vessels, or otherwise, the oaths or declarations required to be taken by the owners thereof prior to the registering thereof, and the books of registry, or copies or extracts therefrom: and whereas it would tend much to the dispatch of business if the attendance of such registering officers with the same upon such trials were dispensed with; be it therefore enacted, that the collector and controller of his Majesty's customs at any port or place, and the person or persons acting for them respectively, shall, upon every reasonable request by any person or persons whomsoever, produce and exhibit for his, her, or their inspection and examination any oath or declaration sworn or made by any such owner or owners, proprietor or proprietors, and also any register or entry in any book or books of registry required by this act to be made or kept relative to any ship or vessel, and shall, upon every reasonable request by any person or persons whomsoever, permit him, her, or them to take a copy or copies or an extract or extracts thereof respectively; and that the copy and copies of any such oath or declaration, register or entry, shall, upon being proved to be a true copy or copies thereof respec-

tively, be allowed and received as evidence upon every trial at law, without the production of the original or originals, and without the testimony or attendance of any collector or controller, or other person or persons acting for them respectively, in all cases, as fully and to all intents and purposes as such original or originals, if produced by any collector or collectors, controller or controllers, or other person or persons acting for them, could or might legally be admitted or received in evidence.

XXI. And be it further enacted, that if the ship or vessel, or the share or shares of any owner thereof, who may be out of the kingdom, shall be sold in his absence by his known agent or correspondent, under his directions either expressed or implied, and acting for his interest in that behalf, and such agent or correspondent who shall have executed a bill of sale to the purchaser of the whole of such ship or vessel, or of any share or shares thereof, shall not have received a legal power to execute the same, it shall be lawful for the commissioners of his Majesty's customs, upon application made to them, and proof to their satisfaction of the fair dealings of the parties, to permit such transfer to be registered, if registry *de novo* be necessary, or to be recorded and indorsed, as the case may be, in manner directed by this act, as if such legal power had been produced; and also if it shall happen that any bill of sale cannot be produced, or if, by reason of distance of time, or the absence or death of parties concerned, it cannot be proved that a bill of sale for any share or shares in any ship or vessel had been executed, and registry *de novo* of such ship or vessel shall have become necessary, it shall be lawful for the commissioners of his Majesty's customs, upon proof to their satisfaction of the fair dealings of the parties, to permit such ship or vessel to be registered *de novo* in like manner as if a bill of sale for the transfer of such share or shares had been produced: provided always, that in any of the cases herein mentioned good and sufficient security shall be given to produce a legal power or bill of sale within a reasonable time, or to abide the future claims of the absent owner, his heirs and successors, as the case may be; and at the future request of the party whose property has been so transferred, without the production of a bill of sale from him or from his lawful attorney, such bond shall be available for the protection of his interest, in addition to any powers or rights which he may have in law or equity against the ship or vessel, or against the parties concerned, until he shall have received full indemnity for any loss or injury sustained by him.

XLII. And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall be made only as a security for the payment of a debt or debts, either by way of mortgage, or of assignment to a trustee or trustees for the purpose of selling the same for the payment of any debt or debts, then and in every such case the collector and controller of the port where the ship or vessel is registered shall, in the entry in the book of registry, and also in the indorsement on the certificate of registry, in manner herein-before directed, state and express that such transfer was made only as a security for the payment of a debt or debts, or by way of mortgage, or to that effect; and the person or persons to

Vessels or shares sold in the absence of owners without formal powers.

Commissioners may permit record of such sales or registry *de novo* as the case may require;

and in other cases where bills of sale cannot be produced;

Security being given to produce legal powers or abide future claims.

Transfer by way of mortgage.

Mortgagee not

to be deemed
an owner.

Transfers of
ships for
security of
debts being
registered,
rights of mort-
gagees not
affected by any
act of bank-
ruptcy of mort-
gagor, &c.

Governors of
colonies, &c.,
may cause
proceedings
in suits to be
stayed.

Penalty of
500*l.* on per-

whom such transfer shall be made, or any other person or persons claiming under him or them as a mortgagee or mortgagees, or a trustee or trustees only, shall not by reason thereof be deemed to be the owner or owners of such ship or vessel, share or shares thereof, nor shall the person or persons making such transfer be deemed by reason thereof to have ceased to be an owner or owners of such ship or vessel, any more than if no such transfer had been made, except so far as may be necessary for the purpose of rendering the ship or vessel, share or shares so transferred, available by sale or otherwise for the payment of the debt or debts for securing the payment of which such transfer shall have been made.

XLIII. And be it further enacted, that when any transfer of any ship or vessel, or of any share or shares thereof, shall have been made as a security for the payment of any debt or debts, either by way of mortgage or of assignment as aforesaid, and such transfer shall have been duly registered according to the provisions of this act, the right or interest of the mortgagee or other assignee as aforesaid shall not be in any manner affected by any act or acts of bankruptcy committed by such mortgagor or assignor, mortgagors or assignors, after the time when such mortgage or assignment shall have been so registered as aforesaid, notwithstanding such mortgagor or assignor, mortgagors or assignors, at the time he or they shall so become bankrupt as aforesaid, shall have in his or their possession, order, and disposition, and shall be the reputed owner or owners of the said ship or vessel, or the share or shares thereof, so by him or them mortgaged or assigned as aforesaid, but that such mortgage or assignment shall take place of and be preferred to any right, claim, or interest which may belong to the assignee or assignees of such bankrupt or bankrupts in such ship or vessel, share or shares thereof, any law or statute to the contrary thereof notwithstanding.

XLIV. And be it further enacted, that it shall and may be lawful for any governor, lieutenant-governor, or commander-in-chief of any of his Majesty's colonies, plantations, islands, or territories, and they are hereby respectively authorized and required, if any suit, information, libel, or other prosecution or proceeding of any nature or kind whatever shall have been commenced or shall hereafter be commenced in any court whatever in any of the said colonies, plantations, islands, or territories respectively, touching the force and effect of any register granted to any ship or vessel, upon a representation made to any such governor, lieutenant-governor, or commander-in-chief, to cause all proceedings thereon to be stayed, if he shall see just cause so to do, until his Majesty's pleasure shall be known and certified to him by his Majesty, by and with the advice of his Majesty's privy council; and such governor, lieutenant-governor, or commander-in-chief is hereby required to transmit to one of his Majesty's principal secretaries of state, to be laid before his Majesty in council, an authenticated copy of the proceedings in every such case, together with his reasons for causing the same to be stayed, and such documents (properly verified) as he may judge necessary for the information of his Majesty.

XLV. And be it further enacted, that if any person or persons shall falsely make declaration to any of the matters herein-before

required to be verified by declaration, or if any person or persons shall counterfeit, erase, alter, or falsify any certificate or other instrument in writing required or directed to be obtained, granted, or produced by this act, or shall knowingly or wilfully make use of any certificate or other instrument so counterfeited, erased, altered, or falsified, or shall wilfully grant such certificate or other instrument in writing, knowing it to be false, such person or persons shall for every such offence forfeit the sum of five hundred pounds.

sons making false declaration, or falsifying any document.

XLVI. And be it further enacted, that all the penalties and forfeitures inflicted and incurred by this act shall and may be sued for, prosecuted, recovered, and disposed of in such manner, and by such ways, means, and methods, as any penalties or forfeitures inflicted or which may be incurred for any offences committed against any law relating to the customs may now legally be sued for, prosecuted, recovered, and disposed of: and that the officer or officers concerned in seizures or prosecutions under this act shall be entitled to and receive the same share of the produce arising from such seizures as in the case of seizures for unlawful importation, and to such share of the produce arising from any pecuniary fine or penalty for any offence against this act as any officer or officers is or are now by any law or regulation entitled to upon prosecutions for pecuniary penalties.

How penalties are to be recovered,

and officers shares.

XLVII. And be it further enacted, that this act may be altered, varied, or repealed by any act or acts to be passed in this session of parliament.

Act may be altered this session.

No. XIV.

3 & 4 Wm. 4, c. 54.

An Act for the Encouragement of British Shipping and Navigation.

I. WHEREAS an act was passed in the sixth year of the reign of his late Majesty king George the Fourth, intituled "An Act for the Encouragement of British Shipping and Navigation," whereby the laws for the encouragement of British shipping and navigation were consolidated and amended: and whereas since the passing of the said act divers acts for the further amendment of the law have been found necessary, and it will be of advantage to the trade and commerce of the country that the said acts should be consolidated into one act; be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament, assembled, and by the authority of the same, that this act shall commence upon the first day of September, one thousand eight hundred and thirty-three, except where any other commencement is herein particularly directed.

6 Geo. 4, c. 109.

Commencement of Act.

II. And be it further enacted, that the several sorts of goods hereinafter enumerated, being the produce of Europe, that is to say, masts, timber, boards, tar, tallow, hemp, flax, currants, raisins, figs, prunes, olive oil, corn or grain, wine, brandy, tobacco, wool, shumac,

Ships in which only enumerated goods of Europe may be imported.

madders, madder-roots, barilla, brimstone, bark of oak, cork, oranges, lemons, linseed, rape-seed, and clover-seed, shall not be imported into the United Kingdom to be used therein, except in British ships, or in ships of the country of which the goods are the produce, or in ships of the country from which the goods are imported.

Places from which only goods of Asia, Africa, or America may be imported.

III. And be it further enacted, that goods, the produce of Asia, Africa, or America, shall not be imported from Europe into the United Kingdom, to be used therein, except the goods hereinafter mentioned, that is to say,

Goods, the produce of the dominions of the Emperor of Morocco, which may be imported from places in Europe within the Straits of Gibraltar :

Goods, the produce of Asia or Africa, which (having been brought into places in Europe within the Straits of Gibraltar, from or through places in Asia or Africa within those Straits, and not by way of the Atlantic Ocean) may be imported from places in Europe within the Straits of Gibraltar :

Goods, the produce of places within the limits of the East India Company's charter, which (having been imported from those places into Gibraltar or Malta in British ships) may be imported from Gibraltar or Malta :

Goods taken by way of reprisal by British ships :

Bullion, diamonds, pearls, rubies, emeralds, and other jewels or precious stones."

Ships in which only goods of Asia, Africa, or America may be imported.

IV. And be it further enacted, that goods, the produce of Asia, Africa, or America, shall not be imported into the United Kingdom, to be used therein, in foreign ships, unless they be the ships of the country in Asia, Africa, or America, of which the goods are the produce, and from which they are imported, except the goods hereinafter mentioned, that is to say,

Goods, the produce of the dominions of the Grand Seigneur, in Asia or Africa, which may be imported from his dominions in Europe, in ships of his dominions :

Raw silk and mohair yarn, the produce of Asia, which may be imported from the dominions of the Grand Seigneur in the Levant seas, in ships of his dominions :

Bullion.

Manufacture deemed produce.

V. Provided always, and be it further enacted, that all manufactured goods shall be deemed to be the produce of the country of which they are the manufacture.

From Guernsey, &c.

VI. And be it further enacted, that no goods shall be imported into the United Kingdom from the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.

Exports to Asia, &c., and to Guernsey, &c.

VII. And be it further enacted, that no goods shall be exported from the United Kingdom to any British possession in Asia, Africa, or America, nor to the islands of Guernsey, Jersey, Alderney, Sark, or Man, except in British ships.

Coastwise.

VIII. And be it further enacted, that no goods shall be carried coastwise from one part of the United Kingdom to another, except in British ships.

IX. And be it further enacted, that no goods shall be carried from

any of the islands of Guernsey, Jersey, Alderney, Sark, or Man, to any other of such islands, nor from one part of any of such islands to another part of the same island, except in British ships.

Between Guernsey, Jersey, &c.

X. And be it further enacted, that no goods shall be carried from any British possession in Asia, Africa, or America, to any other of such possessions, nor from one part of any of such possessions to another part of the same, except in British ships.

Between British possessions in Asia, &c.

XI. And be it further enacted, that no goods shall be imported into any British possession in Asia, Africa, or America, in any foreign ships, unless they be ships of the country of which the goods are the produce, and from which the goods are imported.

Imports into British possessions in Asia, &c.

XII. And be it further enacted, that no ship shall be admitted to be a British ship unless duly registered and navigated as such; and that every British registered ship (so long as the registry of such ship shall be in force, or the certificate of such registry retained for the use of such ship) shall be navigated during the whole of every voyage (whether with a cargo or in ballast), in every part of the world by a master who is a British subject, and by a crew, whereof three-fourths at least are British seamen; and if such ship be employed in a coasting voyage from one part of the United Kingdom to another, or in a voyage between the United Kingdom and the islands of Guernsey, Jersey, Alderney, Sark, or Man, or from one of the said islands to another of them, or from one part of either of them to another of the same, or be employed in fishing on the coasts of the United Kingdom, or of any of the said islands, then the whole of the crew shall be British seamen.

No ship British, unless registered and navigated as such.

XIII. Provided always, and be it further enacted, that all British built boats or vessels under fifteen tons burthen, wholly owned and navigated by British subjects, although not registered as British ships, shall be admitted to be British vessels, in all navigation in the rivers and upon the coasts of the United Kingdom, or of the British possessions abroad, and not proceeding over sea, except within the limits of the respective colonial governments within which the managing owners of such vessels respectively reside; and that all British built boats or vessels wholly owned and navigated by British subjects, not exceeding the burthen of thirty tons, and not having a whole or a fixed deck, and being employed solely in fishing on the banks and shores of Newfoundland, and of the parts adjacent, or on the banks and shores of the provinces of Canada, Nova Scotia, or New Brunswick, adjacent to the Gulf of Saint Lawrence, or on the north of Cape Canso, or of the islands within the same, or in trading coastwise within the said limits, shall be admitted to be British boats or vessels, although not registered, so long as such boats or vessels shall be solely so employed.

But vessels under fifteen tons burthen admitted in navigation upon rivers, &c., although not registered.

Vessels under thirty tons for Newfoundland fishery, &c., need not be registered.

XIV. Provided also, and be it further enacted, that all ships built in the British settlements at Honduras, and owned and navigated as British ships, shall be entitled to the privileges of British registered ships in all direct trade between the United Kingdom or the British possessions in America and the said settlements; provided the master shall produce a certificate under the hand of the superintendent of those settlements, that satisfactory proof has been made before him that such ship (describing the same) was built in the said settlements,

Honduras ships to be as British, in trade with United Kingdom and colonies in America,

and is wholly owned by British subjects ; provided also, that the time of the clearance of such ship from the said settlements for every voyage shall be indorsed upon such certificate by such superintendent.

Ship of any foreign country to be of the built of, or prize to such country ; or British-built and owned and navigated by subjects of the country.

XV. And be it further enacted, that no ship shall be admitted to be a ship of any particular country, unless she be of the built of such country, or have been made prize of war to such country ; or have been forfeited to such country under any law of the same, made for the prevention of the slave trade, and condemned as such prize or forfeiture by a competent court of such country ; or be British built (not having been a prize of war from British subjects to any other foreign country) ; nor unless she be navigated by a master who is a subject of such foreign country, and by a crew of whom three-fourths at least are subjects of such country ; nor unless she be wholly owned by subjects of such country usually residing therein, or under the dominion thereof : provided always, that the country of every ship shall be deemed to include all places which are under the same dominion as the place to which such ship belongs.

Master and seamen not British, unless natural-born, or naturalized, or denizens, or subjects by conquest or cession, or having served in H. M. ships of war.

XVI. And be it further enacted, that no person shall be qualified to be a master of a British ship, or to be a British seaman within the meaning of this act, except the natural-born subjects of his Majesty, or persons naturalized by any act of Parliament, or made denizens by letters of denization ; or except persons who have become British subjects by virtue of conquest, or cession of some newly acquired country, and who shall have taken the oath of allegiance to his Majesty, or the oath of fidelity required by the treaty or capitulation by which such newly acquired country came into his Majesty's possessions ; or persons who shall have served on board any of his Majesty's ships of war in time of war for the space of three years : provided always, that the natives of places within the limits of the East India Company's charter, although under British dominion, shall not, upon the ground of being such natives, be deemed to be British seamen : provided always, that every ship (except ships required to be wholly navigated by British seamen) which shall be navigated by one British seaman, if a British ship, or one seaman of the country of such ship, if a foreign ship, for every twenty tons of the burthen of such ship, shall be deemed to be duly navigated, although the number of other seamen shall exceed one-fourth of the whole crew : provided always, that nothing herein contained shall extend to repeal or alter the provisions of an act passed in the fourth year of the reign of his late Majesty king George the Fourth, for consolidating and amending the laws then in force with respect to trade from and to places within the limits of the East India Company's charter.

Natives of India not to be British seamen.

One British seaman to twenty tons sufficient to constitute a proper crew.

XVII. Provided always, and be it further enacted, that it shall be lawful for his Majesty, by his royal proclamation during war, to declare that foreigners, having served two years on board any of his Majesty's ships of war in time of such war, shall be British seamen within the meaning of this act.

Foreigners having served two years on board H. M. S. during war.

British ship not to depart British port unless duly navigated, &c.

XVIII. And be it further enacted, that no British registered ship shall be suffered to depart any port in the United Kingdom, or any British possession in any part of the world (whether with a cargo or in ballast), unless duly navigated : provided always, that any British

ships, trading between places in America, may be navigated by British negroes ; and that ships trading eastward of the Cape of Good Hope within the limits of the East India Company's charter may be navigated by Lascars, or other natives of countries within those limits.

XIX. And be it further enacted, that if any British registered ship shall at any time have, as part of the crew in any part of the world, any foreign seaman not allowed by law, the master or owners of such ship shall for every such foreign seaman forfeit the sum of ten pounds : provided always, that if a due proportion of British seamen cannot be procured in any foreign port, or in any place within the limits of the East India Company's charter, for the navigation of any British ship ; or if such proportion be destroyed during the voyage by any unavoidable circumstance, and the master of such ship shall produce a certificate of such facts under the hand of any British consul, or of two known British merchants, if there be no consul at the place where such facts can be ascertained, or from the British governor of any place within the limits of the East India Company's charter ; or, in the want of such certificate, shall make proof of the truth of such facts to the satisfaction of the collector and controller of the customs of any British port, or of any person authorized in any other part of the world to inquire into the navigation of such ship, the same shall be deemed to be duly navigated.

If excess of foreign seamen, penalty 10*l.* for each ; except British seamen cannot be procured in foreign ports, or in India ; or proportion destroyed unavoidably ; and certificate produced or proof made.

XX. And be it further enacted, that if his Majesty shall, at any time by his royal proclamation, declare that the proportion of British seamen necessary to the due navigation of British ships shall be less than the proportion required by this act, every British ship navigated with the proportion of British seamen required by such proclamation shall be deemed to be duly navigated, so long as such proclamation shall remain in force

Proportion of seamen may be altered by proclamation.

XXI. Provided always, and be it further enacted, that goods of any sort, or the produce of any place, not otherwise prohibited than by the law of navigation hereinbefore contained, may be imported into the United Kingdom from any place in a British ship, and from any place not being a British possession in a foreign ship of any country, and however navigated, to be warehoused for exportation only, under the provisions of any law in force for the time being, made for the warehousing of goods without payment of duty upon the first entry thereof.

Goods prohibited only by Navigation Law may be imported for exportation.

XXII. And be it further enacted, that if any goods be imported, exported, or carried coastwise, contrary to the law of navigation, all such goods shall be forfeited, and the master of such ship shall forfeit the sum of one hundred pounds.

Forfeitures, how incurred.

XXIII. And be it further enacted, that all penalties and forfeitures incurred under this act shall be sued for, prosecuted recovered, and disposed of, or shall be mitigated or restored, in like manner as any penalty or forfeiture can be sued for, prosecuted, recovered, and disposed of, or may be mitigated or restored, under an act passed in the present session of Parliament for the prevention of smuggling.

Recovery of forfeitures.

XXIV. And be it further enacted, that this act may be altered,

Act may be

altered this session.

varied, or repealed by any act or acts to be passed in this present session of Parliament.

No. XV.

5 & 6 Wm. 4, c. 56.

An Act to Regulate the Admeasurement of the Tonnage and Burthen of the Merchant Shipping of the United Kingdom.

3 & 4 Wm. 4,
c. 55.

Rules established by recited act for ascertaining tonnage repealed.

The rule by which tonnage of vessels is to be ascertained.

WHEREAS by an act passed in the third and fourth years of the reign of his present Majesty, for the registering of British vessels, certain rules are established for ascertaining the tonnage of ships as well on shore as afloat, and of vessels propelled by steam; and the account of such tonnage, whenever the same shall have been ascertained according to the rules therein prescribed (except in the case of ships admeasured afloat), it is thereby enacted shall be deemed the tonnage of such ships, and shall be repeated in every subsequent registry of such ships, unless any alteration shall have been made in their form and burthen, or unless it be discovered that the tonnage had been erroneously computed: And whereas it is considered that the capacity of a ship is the fairest standard by which to regulate its tonnage, that internal measurements will afford the most accurate and convenient method of ascertaining that capacity, and that the adoption of such a mode of admeasurement will tend to the interests of the ship-builder and the owner, as well as to the proper collection of the dues, which by law, are payable on tonnage; and it is expedient to alter and amend the law in this respect: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the commencement of this act, so much of the said recited act as establishes rules for ascertaining the tonnage of ships, shall be and the same is hereby repealed so far as respects the merchant shipping of the United Kingdom, to be thereafter registered.

II. And be it further enacted, That from and after the commencement of this act, the tonnage of every ship or vessel required by law to be registered shall, previous to her being registered, be measured and ascertained while her hold is clear, and according to the following rule; (that is to say,) divide the length of the upper deck between the afterpart of the stem and the forepart of the sternpost into six equal parts. Depths: at the foremast, the middle, and the aftermost of those points of division, measure in feet and decimal parts of a foot, the depths from the under side of the upper deck to the ceiling at the limber strake. In the case of a break in the upper deck, the depths are to be measured from a line stretched in a continuation of the deck. Breadths: divide each of those three depths into five equal parts, and measure the inside breadths at the following

points; *videlicet*, at one-fifth and at four-fifths from the upper deck of the foremast and aftermost depths, and at two-fifths and four-fifths from the upper deck of the midship depth. Length: at half the midship depth measure the length of the vessel from the afterpart of the stem to the forepart of the stern-post; then to twice the midship depth add the foremast and the aftermost depths for the sum of the depths; add together the upper and lower breadths at the foremost division, three times the upper breadth, and the lower breadth at the midship division, and the upper and twice the lower breadth at the after division, for the sum of the breadths; then multiply the sum of the depths by the sum of the breadths, and this product by the length, and divide the final product by three thousand five hundred, which will give the number of tons for register. If the vessel have a poop or half deck, or a break in the upper deck, measure the inside mean length, breadth, and height of such part thereof as may be included within the bulk-head; multiply these three measurements together, and dividing the product by 92.4, the quotient will be the number of tons to be added to the result as above found. In order to ascertain the tonnage of open vessels, the depths are to be measured from the upper edge of the upper strake.

III. And be it further enacted, That the tonnage or burthen of every ship belonging to the United Kingdom, ascertained in the manner herein-before directed, shall, in respect of any such ship which shall be registered after the commencement of this act, (except as herein-after excepted), be inserted in the certificate of the registry thereof, and be taken and deemed to be the tonnage or burthen thereof, for all the purposes of the said recited act.

Tonnage when ascertained, to be entered on register.

IV. Provided always, and be it further enacted, That in each of the several rules herein-before prescribed, when applied for the purpose of ascertaining the tonnage of any ship or vessel propelled by steam, the tonnage due to the cubical contents of the engine room shall be deducted from the total tonnage of the vessel as determined by either of the rules aforesaid, and the remainder shall be deemed the true register tonnage of the said ship or vessel. The tonnage due to the cubical contents of the engine room shall be determined in the following manner: that is to say, measure the inside length of the engine room in feet and decimal parts of a foot, from the foremast to the aftermost bulk-head, then multiply the said length by the depth of the ship or vessel, at the midship division as aforesaid, and the product by the inside breadth at the same division at two-fifths of the depth from the deck taken as aforesaid, and divide the last product by 92.4, and the quotient shall be deemed the tonnage due to the cubical contents of the engine room.

Mode of ascertaining tonnage of steam vessels.

V. Provided always, and be it further enacted, That the tonnage due to the cubical contents of the engine room, and also the length of the engine room shall be set forth in the certificate of registry as part of the description of the ship or vessel, and that any alteration of such tonnage due to the cubical contents of the engine room, or of such length of the engine room, after registry, shall be deemed to be an alteration requiring registry *de novo* within the meaning of the said act for the registering of ships or vessels.

Length and cubical contents of engine room to be set forth in description of steam vessel.

For ascertaining tonnage of vessels when laden.

VI. And be it further enacted, that for the purpose of ascertaining the tonnage of all such ships, whether belonging to the United Kingdom or otherwise, as there shall be occasion to measure while their cargoes are on board, the following rule shall be observed, and is hereby established; (that is to say,) measure, first, the length on the upper deck between the after part of the stem and the forepart of the stern-post; secondly, the inside breadth on the underside of the upper deck at the middle point of the length; and, thirdly, the depth from the underside of the upper deck down the pumpwell to the skin; multiply these three dimensions together, and divide the product by one hundred and thirty, and the quotient will be the amount of the register tonnage of such ships.

Amount of register tonnage to be carved on main beam.

VII. And be it further enacted, That the true amount of the register tonnage of every merchant ship or vessel belonging to the United Kingdom, to be ascertained according to the rule by this act established in respect of such ships, shall be deeply carved or cut in figures of at least three inches in length on the main beam of every such ship or vessel prior to her being registered.

Not to alter tonnage of vessels already registered.

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend to alter the present measure of tonnage of any ship or vessel which shall have been registered prior to the commencement of this act, unless in cases where the owners of any such ships shall require to have their tonnage established according to the rule herein-before provided, or unless there shall be occasion to have any such ship admeasured again on account of any alteration which shall have been made in the form or burthen of the same, in which cases only such ships shall be re-admeasured according to the said rule, and their tonnage registered accordingly.

Commencement of act.

IX. And be it further enacted, That this act shall commence and take effect upon and from the first day of January one thousand eight hundred and thirty-six.

Act may be altered this session.

X. And be it further enacted, That this act may be altered, amended, or repealed by any act or acts to be passed in the present session of Parliament.

No. XVI.

4 & 5 Wm. 4, c. 52.

An Act to amend an Act of the twentieth Year of his Majesty King George the Second, for the Relief and Support of Sick, Maimed, and Disabled Seamen, and the Widows and Children of such as shall be Killed, Slain, or Drowned in the Merchant Service; and for other Purposes.

20 Geo. 2, c. 38.

I. WHEREAS by an act passed in the twentieth year of his Majesty king George the Second, intituled "An Act for the Relief and Support of Maimed and Disabled Seamen, and the Widows and Children of such as shall be Killed, Slain, or Drowned in the Merchants Service," a body corporate and politic was created by the

name of "The President and Governors for the Relief and Support of Sick, Maimed, and Disabled Seamen, and of the Widows and Children of such as shall be Killed, Slain, or Drowned in the Merchants Service," and divers powers and privileges were thereby granted to the said corporation, and regulations made for the management thereof; and various provisions were by the said act made for the relief and support of maimed and disabled seamen, and the widows and children of such as shall be killed, slain, or drowned as aforesaid: and whereas another act was passed in the thirty-seventh year of the reign of his Majesty king George the Third, intituled "An Act for preventing the Desertion of Seamen from British Merchant Ships trading to his Majesty's Colonies and Plantations Abroad:" and whereas it is expedient to repeal some, and to extend and comprise in one act of Parliament others of the provisions of the said two recited acts: be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the thirty-first day of December, one thousand eight hundred and thirty-four, from which day (except as hereinafter is expressly provided) this act shall commence and take effect, the whole of the said recited act of the twentieth year of the reign of his said late Majesty king George the Second, except so far as the same relates to the incorporation and perpetual succession of the said body corporate and politic, or to the powers and authorities thereby vested in the said president and governors for receiving, possessing, and applying such sums of money as should be contributed, devised, or bequeathed to it, and for purchasing and holding lands and erecting an hospital, or to the rules and method thereby provided for supplying the places of the president and assistants, or committees and governors, or members thereof, so often as vacancies shall occur, and making and altering the bye-laws, constitutions, and ordinances of the said corporation; and so much of the said recited act of the thirty-seventh year of the reign of his said late Majesty king George the Third, as relates to the payment and appropriation to, and for the uses and purposes therein mentioned, of the wages of deceased seamen and other persons engaged in British merchant ships trading to the West Indies, and to the penalties and forfeitures thereby imposed, so far as the same are payable or recoverable on account of any infraction of the provisions of the said act respecting the payment and appropriation of such wages as aforesaid; be and the same are hereby declared to be repealed: provided always, that all offences which shall have been committed, and all penalties and forfeitures which shall have been incurred, and all payments and duties to which any party shall have become liable, previous to the commencement of this act, against the provisions of the said acts, shall and may be punishable and recoverable under the said acts as if the same had not been repealed, although such payments and duties shall not in consequence of such liability have become actually receivable by the said president and governors until after the said thirty-first day of December.

II. And be it further enacted, that the said president and governors and their successors shall and may and they are hereby authorized

37 Geo. 3, c.
73.

Repeal of certain parts of recited acts.

Proviso as to offences committed or penalties incurred.

President and governors em-

powered to relieve disabled seamen and their widows and children.

Seamen to produce certificate of the hurt they have received.

Parties signing the certificate to make oath of the truth thereof.

Certificates to be produced by seamen disabled by sickness, and by widows and children of seamen.

and empowered to provide, in such their hospital as aforesaid, for the reception of such seamen as shall be rendered incapable of present or future service by sickness, wounds, or other accidental misfortunes, and those who shall become decrepit or worn out by age, or shall provide for such seamen by allowing them certain pensions, or otherwise as to the said president and governors and their successors shall seem meet and most for the advantage of the said charity; and also to relieve the widows and children of such seamen as shall be killed, slain, or drowned in the said service; and also to relieve the widows and children of such seamen as shall die after having contributed during a term of twenty-one years to the funds of this corporation, provided such children are not of the age of fourteen years, or if of that age or upwards, not capable of getting a livelihood by reason of lameness, blindness, or other infirmities, and are proper objects of charity; and also to relieve the widows and children (such children being proper objects of charity as aforesaid) of such seamen as at the time of their death shall have been receiving or have been entitled to receive pensions, under and by virtue of this act, from the fund hereby to be created, as decrepit or worn out seamen: provided that no widow shall be entitled to any benefit under this act who shall not have been the wife of such seaman or pensioner before he became entitled to relief under the provisions of this act: provided nevertheless, that no seaman in the said service shall be entitled to any of the provisions or benefits of this act, on account of any hurt or damage he may have received on board any ship or vessel, unless he shall produce, or cause to be produced, a certificate to the said president, assistants, and committees, of the hurt or damage he hath received, from the master, mate, boatswain, and surgeon, or so many of them as were in the ship or vessel to which such seaman belonged at the time of his receiving such hurt or damage, or of the master and two of the seamen, if there be no other officer, or in case the master shall die, or be killed or drowned, then of the person who shall take upon him the care of the ship or vessel, and two of the seamen on board the same, under their hands and seals, thereby signifying how and in what manner such seaman received such hurt or damage, whether in fighting, defending, working, loading, or unloading the said ship or vessel, where and when he entered, and how long he had served on board the same; and the parties so signing and sealing such certificate shall and are hereby required to make oath of the truth of the contents thereof before some one of his Majesty's justices of the peace, if given in Great Britain or Ireland, or other his Majesty's dominions, or the chief officer of the customs of the port or place where there is no justice of the peace, or before the British consul or resident in any foreign country where such certificate is executed (who are hereby respectively authorized and required to administer the same without fee or reward); and in case of sickness, whereby such seaman shall be rendered incapable of service, a certificate signed, sealed, and authenticated in like manner, signifying that he was healthy when he entered on board such ship or vessel, and that such sickness was contracted on board the same, or on shore, in doing his duty in the service of the ship, and not otherwise, and expressing the time and place he entered on board such ship or

vessel, and how long he had served therein; and that no widow, child, or children of any seaman killed, slain, or drowned in the said service, shall be relieved or entitled to any allowance by virtue of this act unless she or they, or some person on her or their behalf, shall produce a certificate, signed, sealed, and authenticated in like manner, signifying how and in what manner such seaman lost his life in the service of the said ship or vessel, the time and place he entered on board, and how long he had served therein; and that no widow, child, or children of any seaman in the said service shall be entitled to any relief by virtue of this act unless she or they shall produce, or cause to be produced, a certificate under the hands and seals of the minister and churchwardens and overseers of the poor of the parish, township, or place, or any two of them, or under the hands and seals of the minister and overseers of the poor of the parish, township, or place, or any two of them, where there are no churchwardens, or if in Scotland by the minister and elders, or if in Ireland by a justice of the peace for the parish, township, or place where such widow, child, or children shall at the time reside, and if such widow, child, or children are some of the people called Quakers, then by any two reputable persons of that persuasion of the parish, township, or place where such widow, child, or children have a legal settlement, or do inhabit and reside, to be attested by two or more credible witnesses, that such widow was the lawful wife and real widow, and that such child or children was or were the lawful child or children of such deceased seaman as aforesaid, and that such child, or children is and are under the age of fourteen years, or if of that age or upwards, not capable of getting a livelihood by reason of lameness, blindness, or other infirmities, and is or are proper objects of charity; and that no seaman shall be provided for by a pension or otherwise, as decrepit or worn out, unless such seaman shall have served in the merchant service for the space of five years, and shall have during that time contributed and paid the monthly duty out of his wages, in and by the act of the twentieth year of the reign of king George the Second hereinbefore recited, or in and by this act, required to be henceforward paid and deducted as the case may happen, for the uses and purposes in and by this act provided.

Decrepit seamen not entitled to the benefit of this act unless they have served five years, and contributed monthly.

III. Provided always, and be it further enacted, that if any person shall forge, counterfeit, erase, or alter, or shall procure to be forged, counterfeited, erased, or altered, or shall unfairly or unduly obtain, any certificate in order to entitle him or her to any of the pensions, allowances, or benefits of this act, and shall produce or cause such certificate to be produced for that purpose, such certificate shall, upon discovery thereof, be null and void, and such person so applying for relief or provision shall be for ever incapable of receiving any of the benefits of this act, and shall be subject and liable to the like punishment as an incorrigible rogue is subject and liable to, and shall be punished accordingly as such.

Persons forging, &c., certificates to be punished.

IV. And be it further enacted, that the said president, with any five or more of the said assistants or committees for the time being, shall make a full court of assistants or committees, and shall meet from time to time upon Wednesdays, weekly, in or near the city of London, or at such other time or place as they shall think fit to

President and five assistants to make a court, who are to meet weekly.

The court may apply the monies of the corporation, and appoint the officers and their salaries ;

exception ;

and do all other matters and things necessary.

All masters and owners of merchant ships or vessels, &c., to pay 2s. per month.

appoint ; and such court shall have power, when assembled as aforesaid, in the name of the said corporation and on their account, to apply the monies arising and to be received by virtue of this act, or otherwise belonging to and vested in the said corporation, for the relief and support of such seamen, their widows and children, as are hereinbefore described, and in case there shall be any surplus thereof, or any sum or sums of money shall be contributed and given for the purpose of this act by any well-disposed persons, to lay out the same in parliamentary securities, or to dispose of the same in the purchase of such lands, tenements, or hereditaments, as are allowed to be purchased and held by the said corporation by the said recited act of the twentieth year of the reign of his said late Majesty George the Second, and with and under their common seal, to enter into any covenants or contracts for the purposes aforesaid, as they shall think fit for the better promoting and carrying into effect the provisions of this act ; and to appoint and choose, and at their pleasure to remove, displace, and supply any officers, servants, and other person and persons to be employed for the purposes herein-mentioned and intended, or other the affairs of the said corporation (other than and except such officers and persons as by the said act of the twentieth year of the reign of his said late Majesty king George the Second, are directed to be chosen and appointed at a general court or assembly of the said corporation), and to direct and appoint such salaries, perquisites, and other rewards for their labour and service therein as they shall approve and think proper, and to do, manage, transact, and determine all such matters and things as to them, or the greater part of them, shall appear necessary and convenient for the effecting and carrying on the purposes hereby intended.

V. And be it further enacted, for effecting the ends and purposes aforesaid, that every master of any merchant ship or vessel belonging or to belong to any of the subjects of his Majesty, his heirs or successors, and every owner being a British subject navigating or working his own ship or vessel, whether the said ship or vessel shall be employed on the high sea or coasts of Great Britain or Ireland, or in any port, bay, or creek of the same, shall, from and after the thirty first day of December one thousand eight hundred and thirty-four, pay, and there shall be allowed and paid by every such master or owner, two shillings per month of lawful money of Great Britain, and proportionably for a lesser time, during the time he or they shall be employed in or navigate or work such merchant ship or vessel, for the uses and purposes aforesaid : provided always, that such masters or owners of such ships or vessels, or their widows and children under fourteen years of age, or being objects of charity as aforesaid, shall have and be entitled to have a proportionate increase of the pension or other allowance, as in and by this act is provided, according to the difference between the amount of the monthly duty hereby required to be paid by other seamen, mariners, and pilots, in case such master or owner shall have paid the said sum of two shillings per month for a period of five years or sixty months before any application to the said president and governors for relief under this act or the provisions thereof, or any of them ; but in case any such master or owner shall be killed or drowned, or become decrepit and maimed or disabled, before he or they shall have paid such increased rate of

two shillings per month for the full period of five years or sixty months as aforesaid, then such masters or owners, or their widows and children, shall have and be entitled to have and receive such smaller pension or allowance as the said president and governors, or the trustees to be appointed as hereinafter mentioned shall think fit.

VI. And be it further enacted, that every seaman or other person whatsoever who shall serve or be employed by any person or persons whatsoever in any merchant ship, or other private ship or vessel, belonging or to belong to any of the subjects of his Majesty, his heirs or successors, whether the said ship or vessel shall be employed on the high sea or coasts of Great Britain or Ireland, or in any port, bay, or creek of the same, and every pilot employed on board any such ship or vessel, shall, from and after the thirty-first day of December one thousand eight hundred and thirty four, pay, and there shall be allowed and paid by every such seaman, pilot, or other person employed or that shall be employed, one shilling per month of lawful money of Great Britain, and proportionably for a lesser time, during the time he or they shall be employed in or belong to the said ship or vessel, for the uses and purposes aforesaid: provided always, that this act shall not extend or be construed to extend to any person or persons who shall be employed in any boat upon any of the coasts of Great Britain or Ireland, or the Islands of Guernsey, Jersey, Alderney, Sark, and Man, in taking fish, nor to any person or persons employed in boats or vessels that trade only from place to place within any river of Great Britain or Ireland.

VII. And be it further enacted, that the master, owner, or commander of every such merchant or private ship or vessel is hereby empowered and required to deduct and detain out of the wages, shares, or other profits payable or accruing to such seaman or other person employed on board such ship or vessel (other than such persons as are hereby excepted), the said monthly duty, and shall pay the same, together with the amount of the duty due and owing from himself, to such officer or officers as shall on that behalf be appointed by the said president and governors, or the trustees to be appointed at any of the out ports in manner hereinafter provided, and their successors, for the collecting, recovering, and receiving the said duty of one shilling per month, if such seaman or other person shall have or be entitled to any such wages, shares, or profits.

VIII. And be it further enacted, that it shall and may be lawful for the said president and governors, and their successors, at a full court of assistants or committees, to appoint such person or persons as they shall think fit to be receiver or receivers of the said duties of two shillings and one shilling per month at the port of London, and also depute and appoint the collectors or other officers of the customs of his Majesty, his heirs and successors, in the several out-ports of Great Britain and Ireland, with the concurrence of the commissioners of the said customs, or such other persons as they shall think fit, to collect and receive the same (except in such out-ports and where separate trustees shall have been appointed by virtue of this Act); which said receivers, as also the collectors and officers of the customs, are hereby empowered and required to collect, receive, and pay over the said duties according to such instructions and di-

All seamen or other persons serving on board such ships or vessels to pay 1s. per month.

Masters of ships to keep in their hands 1s. per month out of seamen's pay, and pay over the same to the receiver of the duties.

Receivers to be appointed for the port of London and the out-ports, who are to collect and pay over the duties according to instructions.

rections as shall be from time to time sent to them in writing by the said president and governors and their successors; and for the care and pains therein of the said collectors and other officers of the customs to be appointed to collect, recover and receive the said duty, it shall and may be lawful for the said president and governors and their successors, at such court of assistants or committees as aforesaid, to make such allowance to them out of the said duties as they shall judge reasonable, so that the same do not exceed the sum of five pounds per centum on the gross amount thereof.

Masters to keep muster roll, and deliver duplicates thereof to the collectors.

IX. And be it further enacted, that every master, commander, or owner of any merchant ship or other private ship or vessel navigating the same, or such other person as shall have the care thereof, shall keep a book by way of muster roll or account of the ship's company, signed by himself, in which shall be entered his own christian and surname, and the christian and surnames of all the officers, seamen, and other persons employed in such ship or vessel, and over against each name the age, place of birth, and quality of such seaman or other person, and the time and place when he entered into the service of such ship or vessel; and such master, commander, or owner, or other person having the care of such ship or vessel shall continue to keep such book by way of muster roll during the whole course of the voyage, and shall from time to time enter therein when and where any such master, officer, seaman, or other person shall be discharged from or shall leave or desert such ship or vessel, and when and where any other officers and men shall be shipped on board, describing them in like manner as the persons who first entered on board, are directed to be described, and when and where any of them received any hurt or damage, or were killed, slain, or drowned or otherwise happened to die, in case there should be any such, together with the statement of the amount of wages due to them at the time of death or desertion, and of what clothes or other effects such deceased man shall have left on board; which said account shall be in the form, and shall contain a true and correct return under their respective heads of the several particulars expressed in the schedule marked (A.) and to this act annexed; a duplicate of which account shall, if required, be signed by the said master, commander, or other person having the care of the ship or vessel as aforesaid, and shall be delivered to the collectors or receivers of the said duties so appointed as aforesaid, at whatever port in Great Britain or Ireland any such ship or vessel shall report or discharge her cargo; and every such duplicates for vessels not belonging to such port of discharge shall be forwarded by such receiver to the said president and governors, to be by them transmitted to the trustees of the port to which the vessel shall belong; and in case any such master, commander, or other person shall neglect to keep such muster roll or account, or shall neglect or refuse to deliver such duplicate as aforesaid, and in case such receiver or collectors shall neglect or refuse to transmit the duplicates which shall be delivered to them as aforesaid to the said president and governors, every such person so offending shall forfeit and pay for every such refusal or omission the sum of five pounds of lawful money of Great Britain.

Receivers to transmit duplicates of vessels not belonging to their port.

Penalty for neglect, by masters, &c. Masters of vessels to de-

X. And be it further enacted, that the master for the time being of every ship coming within the provisions of this act shall have

authority to deduct out of the wages of the seamen thereof the amount of all forfeitures to be incurred by any such seamen, and every such master is hereby required correctly and truly to enter the same in a book to be by him kept for that purpose, which shall be signed by the master and the person next to him in the command of the ship, both of whom shall therein certify that it contains all the forfeitures which have been incurred by the seamen of the ship during the voyage, to the truth whereof the master shall make oath when required by the officer of the said president and governors in London, or of the trustees at any of the out-ports, if any, and if not, to the respective receivers or collectors of the said president and governors at such out-ports appointed to receive the monies payable in respect of the wages of merchant seamen, which oath such officer is hereby authorized to administer; and the said book, or a true copy thereof signed and certified as aforesaid, shall, within one calendar month after the ship's return from her voyage, be delivered to the said officer by the master, together with extracts from the log book of the entries therein of the causes of the several forfeitures which are hereinbefore required to be made; and every master as aforesaid who shall refuse or neglect to deliver any such account as hereby required, shall forfeit and pay the sum of twenty pounds.

duct penalties from wages of seamen, and deliver a verified account thereof to officers of president and governors, under penalty of 20*l*.

XI. And be it further enacted, that it shall and may be lawful to and for the said collectors or receivers, for the better discovery of what shall be due from the several persons serving on board or belonging to any merchant ship or other private ship or vessel aforesaid, by warrant under his or their hand or hands to summon every such master and commander, or in his absence such owner or owners of such ship or vessel as aforesaid, to be and appear at the office of the said collectors or receivers respectively (so that the persons so summoned be not obliged to travel above ten miles for the making such appearance), which said collectors or receivers are hereby empowered and directed to examine every such master and commander or owner or owners as to the truth of the copy of such book or muster roll, and as to the number and times of service of all the several persons belonging to or employed in such ship or vessel, who are liable to or chargeable with the said duty; and if such masters or commanders, or in their absence such owner or owners, or any of them, shall refuse or neglect when so summoned to appear before the said respective persons hereby empowered to examine them in manner as aforesaid, or if they shall appear and obstinately refuse to make a full and true discovery of the matters aforesaid, then and in every such case all and every such offender or offenders for every such refusal shall forfeit the sum of ten pounds of lawful money of Great Britain.

Collectors may summon masters of vessels, and examine them upon oath as to the truth of the muster rolls.

Masters refusing to appear or to answer, to forfeit 10*l*.

XII. And for the more easy and effectual collection of the said duties of and from the masters, commanders, and owners of merchants ships, or other private ships or vessels, that are or shall be hired or employed on monthly charter by the several departments of the navy, victualling, ordnance, customs, post-office, or other public offices for or in the service of his Majesty, his heirs or successors; be it further enacted, That the secretaries or chief clerks of the aforesaid offices or departments respectively, shall once in every year, upon the first day of January in each year, or within

Secretaries, &c., of public offices to give in a list of ships employed in their service.

twenty days next following at the farthest, upon application being made to them by the said president and governors for that purpose, give and deliver to the receiver or receivers of the said duties in the port of London, a true and exact list or account of the number and names of all and every the ships or vessels that in the year preceding every such account shall have been hired or employed by the commissioners or other officers of every such office respectively, for or in the service of his Majesty, his heirs, or successors, and of all and every the ships and vessels which, at the time of delivering in such account, remain in the service of every such office or department respectively, and of all such as between every such account shall be discharged from such service, and of the names of the masters, commanders, and owners of all and every such ships and vessels respectively, and also of the numbers of seamen or other persons, that shall from time to time be employed in every such ship or vessel; and that no treasurer, paymaster, or other officer of or belonging to any such public office or offices, shall make out or pay any bill for the freight of any ship or vessel so hired or employed, or to be hired or employed, for or in the service of his Majesty, his heirs and successors as aforesaid, or pay any wages to any master, commander, or other persons employed, or that shall be employed in any such ship or vessel, until every such master, commander, or owner respectively shall and do produce and show unto such treasurer, paymaster, or other officer respectively, an acquittance or certificate, signed by the said receiver or receivers, or his or their deputy or deputies for the time being, whereby it shall appear that such master, commander, or owner hath duly and fully paid and discharged the said duties payable by virtue of this act, and that he is not more than three months in arrear for the same.

Treasurers, &c., of such offices to pay no wages or freight to any master, &c., until he produce an acquittance signed by receiver of duties.

Duties to be paid at the port where any ship or vessel shall unload her cargo.

XIII. And be it further enacted, That all and every the masters, commanders, and owners of all merchant ships, and other private ships and vessels whatsoever by this act made liable to the payment of the said duties of two shillings per month, and one shilling per month, shall pay all such monies as shall from time to time be due from them and every of them respectively for or on account of the said duties to the collectors and receivers appointed in pursuance of this act, or of the said act of the twentieth year of the reign of his said late Majesty king George the Second, at whatever port in the said United Kingdom of Great Britain or Ireland, any such ship or vessel shall report or discharge her cargo, and before any such ship or vessel shall be cleared inwards by the officers of the customs of his Majesty, his heirs, or successors, in any such port; and that no customer, collector, comptroller, receiver, surveyor, searcher, waiter, or other officer of the customs of his Majesty, his heirs, or successors, shall at any time hereafter, clear inwards any merchant ship, or any private ship or vessel whatsoever by this act made liable to the payment of the said duties, or grant any warrant, or give or grant out any cockets, transire, returns, or discharges unto or for any ship or vessel whatsoever, or shall permit or suffer any such ship or vessel to go out of any of the ports before mentioned, until the said master, commander, or owner or owners of every such ship or vessel respectively, shall and do produce, and show forth unto such officer or officers, an acquittance or certificate, signed by the

said receiver or receivers, collectors or collector of the said duties, whereby it shall appear that such master, commander, or owners have duly and fully paid the said duties, and are not more than three months in arrear for the same, or that they are exempt from the payment of the said duties by virtue of the exceptions herein contained; and that every master, commander, or owner of any such ship or vessel who shall refuse or neglect to pay the said duty or duties, in manner, and within the time herein-before limited and appointed for payment thereof, and also every customer, collector, comptroller, receiver, surveyor, searcher, waiter, and other officer of the customs who shall make default in any of the premises enjoined them respectively by this act, or shall in anywise act contrary to the directions herein-before mentioned, shall for every such refusal, neglect, default, or act, forfeit the sum of ten pounds of lawful money of Great Britain; and that the amount of such duties as shall be received in pursuance of this act, so far as the same shall be derived from the duty imposed upon the masters, commanders, or owners, and seamen, or in respect of the wages of the masters, commanders, or owners and seamen, in such ships or vessels as shall not belong to the particular port at which such ships or vessels shall be reported or discharge their cargoes, shall be and the same is hereby required to be remitted by the collectors or receivers of the said duty at the port aforesaid to the receiver of the port of London, and that the same shall, when so received by him, be transmitted by him to the trustees (if any) of the several ports to which every such ship or vessel shall respectively belong: provided always, that it shall and may be lawful for the master, commander, or owner of any merchant ship, or private ship, or vessel which shall belong to any of the out-ports at which trustees shall have been appointed for the purposes herein-after mentioned under the provisions of this act, or by virtue of the said act of his late Majesty king George the Second, to enter into an agreement in writing with the trustees, and receiver or collector for such out-port, with the intent that the whole of the duties payable under this act on account of the said ship or vessel, and so often as the same shall be employed, may be paid to the said receiver or collector of the said out-ports by half-yearly payments; that is to say, within twenty-one days after the thirtieth day of June and thirty-first day of December respectively in every year; and that it shall and may be lawful for the masters or owners of any ship or vessel employed in the coasting trade, or only going from one port to another in any part of the coasts of Great Britain or Ireland, to enter into a similar agreement with the receiver or collector, and the trustees of any of the ports to which such ship or vessel may belong; and that every such master, commander, or owner, having entered into any such agreement as aforesaid, on account of any ship or vessel, shall not be required to make any payment on account of the said duties at any port at which the said ship or vessel shall report or discharge its cargo other than that to which it belongs, nor shall such master or owner be exposed to any of the penalties, nor the said ship or vessel be in any way delayed or impeded by the said officers of his Majesty's customs, or any other person, in consequence of such nonpayment at any other port than as aforesaid, provided such master or owner produces before the collector

Master or owner may enter into agreement with trustees and collectors for half-yearly payments;

certificate of such agreement.

Payment under such agreement to be enforced.

If masters fail to produce proper certificates, tide-waiters to be continued on board at their expense.

Penalties by this act recoverable before a magistrate.

Service of notice of application.

Owners and masters of ships of any of the outports empowered to meet and appoint trustees for the said duties, who are to continue till 26th December in each year.

or receiver for the port at which such ship or vessel shall report or discharge her cargo, a certificate of the agreement herein-before mentioned, to be signed by the collector or receiver for the port to which such ship or vessel belongs; and such half-yearly payments of the said duties shall be enforced in the same manner and under the same penalties as are herein-before provided for the general collection of the duties to be levied under the provisions of this act: provided always, that a yearly statement of the sums so received and distributed at each such port be made and published in one of the county or other newspapers circulating in the district.

XIV. And to prevent unnecessary delays in clearing ships and vessels, be it further enacted, That in case the master, commander, or owner of any ship or vessel liable to the payment of the duties aforesaid, shall not produce such acquittance or certificate of payment, or of an agreement for such half-yearly payment to be made at the port to which such ship or vessel belongs, as is herein-before mentioned, to the tide surveyor when he shall come on board in order to clear such ship or vessel, the tide waiters on board such ship or vessel shall be continued until such acquittance or certificate is produced, at the expense of such master, commander, or owner, and not at the expense of the crown.

XV. And be it further enacted, That the penalties and forfeitures by this act provided to be paid by any master or owner of any such merchant ship or vessel shall be recoverable before any magistrate or justice of the peace of the port or place at which any such ship or vessel shall be reported, or shall discharge her cargo as aforesaid; and that notice of any application for recovering any such penalty or penalties before such magistrate or justice of the peace which shall have been served on the owner, master, or commander, broker, or agent of any such ship or vessel, shall be deemed sufficient notice.

XVI. And whereas the masters, commanders, and other officers and seamen employed in ships or vessels belonging to persons residing at some of the out-ports of Great Britain or Ireland, may be desirous of having the said several duties of two shillings *per mensem*, and one shilling *per mensem* to be allowed and paid by them out of their wages as aforesaid, placed under the direction and management of persons residing in or near to such out-ports respectively; be it therefore enacted, That from and after the first day of October one thousand eight hundred and thirty-four, and without being compelled to wait until this act for the other general purposes herein mentioned is to commence and take effect as is aforesaid, it shall and may be lawful to and for the owners of and the masters and commanders employed on board the ships and vessels belonging to persons residing at any of the said out-ports to assemble and meet at any proper time and place within the limits of the said out-ports that shall be by any five or more of them appointed by giving ten days previous notice, to be fixed at the custom house, wharf, quay, or any other public place at such respective out-port; and such owners, masters, and commanders, or the greater part of them, being so assembled as aforesaid, are hereby authorized and empowered from time to nominate and appoint, by an instrument in writing under

their hands and seals, fifteen persons to be trustees for such out-port, for receiving, collecting, and applying the said duties of two shillings *per mensem* and one shilling *per mensem*, to be allowed, collected, and received by virtue of this act, at such respective out-port, for relief and support of the seamen employed on board the ships or vessels belonging to such persons respectively, and their widows and children, as shall be entitled thereto by virtue of this act; which said trustees shall continue to act until the twenty-sixth day of December one thousand eight hundred and thirty-five, and until new trustees are nominated, appointed, and confirmed; and that within ten days after the twenty-sixth day of December in each succeeding year, the owners, masters, and commanders at such respective out-ports shall have power to meet and choose fifteen persons to be trustees for the year ensuing, by an instrument in writing under the hands and seals of the owners, masters, and commanders, or the majority of them so assembled, having given previous notice in the manner hereinbefore directed; which said respective trustees shall continue from time to time until new trustees are nominated, appointed, and confirmed as aforesaid; and the said instrument shall be sent free of expense, to the president and assistants or committees of the said corporation, who are hereby authorized and required to confirm the same under the common seal of the said corporation, without fee or reward, within fifteen days after the receipt thereof; which said trustees when they shall be so confirmed as aforesaid (and whereof five shall be a quorum) shall be vested with and have the same powers and authorities to make bye-laws, and to revoke or alter the same, and to take, receive, and apply any sum or sums of money which shall be contributed, devised, or bequeathed by any well disposed persons for the purposes aforesaid, and to appoint receivers and other officers, and to collect, recover, receive, pay, and apply the said duties of two shillings per month and one shilling per month so to be allowed and paid by the seamen or other persons serving on board any ship or vessel belonging to such persons respectively at such outports as aforesaid, according to such rules, orders, and regulations as are or shall be established by virtue and in pursuance of this act, or have been established and continued under the provisions of the said act of the twentieth year of the reign of his said Majesty George the Second, so far as the same are not inconsistent with or repealed or varied by the provisions of this act; and the said receivers and other officers shall have the same powers and authorities as the other receivers and officers to be appointed in pursuance of this act, and shall be subject and liable to the same penalties and forfeitures, any thing herein contained to the contrary thereof in anywise notwithstanding: provided always, that if the said instrument of trust in this act mentioned shall not be sent to the president and assistant or committees within sixty days after every such nomination and appointment of trustees, when any such shall have taken place, the trust thereby created shall be considered void, and the trustees appointed under it as discharged from the said trust; and that the said president and governors and their successors duly appointed shall have power to appoint a receiver or receivers for the port or place from which such instrument of trust shall not have been sent as aforesaid, for the purpose of collecting the duties

New trustees to be chosen yearly, and instrument of election to be confirmed by president, &c.

Five trustees to be a quorum, with power to make bye-laws and appoint officers.

Instrument of trust to be forwarded to president and governors within sixty days after every 26th December.

and allowances payable under and by virtue of this act at such port or place aforesaid; and that the said president and governors and their successors shall have power to demand and receive from the outgoing trustee or trustees of such port or place aforesaid an account in writing of the former management of such void trust, and also to demand the payment from such trustee or trustees of any balance which may at the time of such default be in the hands of such trustee or trustees, who are hereby required to pay and deliver over the same to such receiver so to be appointed as aforesaid, together with the books of account and other books belonging to such trustee or trustees relative to such trust.

Appointments on default not revocable within five years.

XVII. And be it further enacted, that where, on the default or neglect aforesaid, any such receiver or receivers shall be appointed, such appointment shall not be revocable within five years after the same shall have been so made, except by the said president and governors as they shall see fit.

Trustees heretofore appointed at the several out-ports to be subject to the provisions of this act.

XVIII. And whereas trustees have been nominated and appointed at many of the out-ports of England for similar purposes to those hereby provided under and by virtue of the said act of his Majesty King George the Second; be it further enacted, and it is hereby declared, that all such trustees are to be deemed within and subject to the provisions of this act in the same manner as if they had been nominated, appointed, and confirmed under and by virtue thereof; and all such trustees are hereby empowered to continue to act in their respective trusts until the twenty-sixth day of December one thousand eight hundred and thirty-five, or until new trustees shall have been appointed, nominated, and confirmed by virtue of this act.

The corporation of the merchants venturers of Bristol appointed trustees for the duties, &c., received there;

XIX. And whereas by letters patent, bearing date the eighteenth day of December, in the sixth year of the reign of king Edward the Sixth, certain merchants therein named, and their successors, residing in the city and port of Bristol, are incorporated by the name of "The Master, Wardens, and Commonalty of Merchant Venturers of the City of Bristol," which said society of merchants are willing, for the benefit of the seamen employed on board ships and vessels in the service of merchants and other traders belonging to the said city and port, to undertake the collection and application of the duties payable under this act at the said city and port, and to continue to exercise the powers and authorities and to discharge the trusts vested in them by the said act of the twentieth year of the reign of king George the Second, except so far as the same are varied or revoked by this act; be it further enacted, that the master, wardens, assistants, and treasurer of the said incorporated society for the time being shall be trustees, and shall have and be vested with the like powers and authorities for collecting, recovering, receiving, and applying the said duties of two shillings per month, and one shilling per month to be allowed, collected, and received by virtue of this act at the said city and port, and for taking, receiving, and applying any sum or sums of money which shall be contributed, devised, or bequeathed by any well-disposed persons for the relief and support of the seamen employed in the ships and vessels belonging to the merchants and traders residing at the said city and port, and their widows and children, as shall be entitled thereto by virtue of this act, and to appoint and continue receivers and other officers for the purposes

aforesaid, as are given by this act to the said president and governors, according to such rules, orders, and regulations as are or shall be established by virtue of this act, or having been established by virtue of the said act of the reign of king George the Second, are not inconsistent with, or revoked by, the provisions of this act; and such receivers and officers shall have the same powers and authorities as the other receivers and officers appointed or continued by virtue of this act, and shall be subject and liable to the same penalties and forfeitures; and the said master, wardens, assistants, and treasurer shall also have power to take, receive, and hold any lands, tenements, and hereditaments in such manner and for the like purposes only as the said president and governors are by this act, or by the said act of the twentieth year of the reign of king George the Second, empowered to take, receive, and hold lands, tenements, and hereditaments, anything herein contained to the contrary thereof in anywise notwithstanding.

and empowered to hold lands for the purpose of this act.

XX. And whereas the guild or brotherhood of masters and pilots, seamen of the Trinity House of the town and port of Kingston-upon-Hull, are willing, for the benefit of the seamen employed on board ships and vessels in the service of merchants and other traders belonging to the said town and port, to undertake the collection and application of the said duties payable under this act at the said town and port, and to continue to exercise the powers and authorities and discharge the trusts vested in them by the said act of the twentieth year of the reign of king George the Second; be it therefore enacted, that the guild or brotherhood of masters and pilots, seamen of the Trinity-house of the town and port of Kingston-upon-Hull for the time being shall be trustees, and shall have and be vested with the like powers and authorities for collecting, recovering, and applying the said duties of two shillings per month and one shilling per month to be paid at the said town and port, and for taking, receiving, and applying bequests and donations for the purposes aforesaid, and for appointing and continuing receivers and other officers, as are given and granted by virtue of this act to the president and governors aforesaid, according to such rules, orders, and regulations as are or shall be established by virtue of this act, or being established under and by virtue of the said act of the twentieth year of the reign of king George the Second, are not inconsistent with, or revoked by, the provisions of this act; and such receivers and other officers shall have the same powers and authorities as the other receivers and officers to be appointed or continued under this act, and shall be subject to the like penalties and forfeitures, anything herein contained to the contrary thereof notwithstanding.

The guild of the Trinity House of Kingston-upon-Hull appointed trustees for the duties, &c., received there.

XXI. And whereas it is expedient that the port of the city of Glasgow, the port of Greenock, and the ports of Port Glasgow, Crawford's Dyke, Gourcock, and their dependencies, all situate and being on the river or firth of Clyde, in Scotland, shall be deemed and taken as one united port for the purposes of this act; be it therefore enacted, that the said port of the city of Glasgow, the port of Greenock, and the ports of Port Glasgow, Crawford's Dyke, Gourcock, and their dependencies, all situate and being on the river or firth of Clyde, shall, for the purposes of this act, be held, deemed, and taken as one united port; and that it shall and may be lawful

The ports of Glasgow, Greenock, and Port Glasgow, &c., to be deemed one united port, and masters of ships belonging thereto to elect trustees for collecting duties, &c.

for the owners, masters, and commanders of ships and vessels belonging to persons residing at any of the said united ports of Glasgow, Greenock, Port Glasgow, Crawford's Dyke, Gourrock, and their dependencies, to assemble and meet at Glasgow, upon notice given for that purpose in the manner hereinbefore directed, and such owners, masters, and commanders, or the greater part of them, being so assembled, are hereby authorized and empowered from time to time to make bye-laws, and elect and appoint fifteen persons to be trustees for such united port, of whom five shall be resident at each of the said ports of Glasgow, Greenock, and Port Glasgow, for the purposes of this act; and which said trustees shall be invested with all the powers and authorities that are given and granted by virtue of this act to the trustees of any other out-port, and shall have and be vested with full power and authority for recovering, collecting, receiving, and applying all such rates and duties as may be deemed adequate for the relief of the sick, worn out, and decayed seamen belonging to the said ports and their dependencies, and their widows and families, not exceeding in the whole the said duties of two shillings per month and one shilling per month, to be allowed, collected, and received by virtue of this act at the said united ports of Glasgow, Greenock, Port Glasgow, Crawford's Dyke, Gourrock, and their dependencies, and for taking, receiving, and applying any sum or sums of money which may have been or shall be contributed by any well-disposed persons, or which may have been or shall be otherwise collected for the relief and support of the seamen employed in the ships and vessels belonging to the merchants and traders residing at the said united ports of Glasgow, Greenock, Port Glasgow, Crawford's Dyke, Gourrock, and their dependencies, or either of them, and their widows and children, as shall be entitled thereto by virtue of this act, anything herein contained to the contrary thereof in anywise notwithstanding.

Trustees of out-ports to transmit account of yearly receipts and expenditure to president and governors.

XXII. And be it further enacted, that all and every the trustees for the several out-ports who now are or shall be appointed under and by virtue of the act of the twentieth year of the reign of his said late Majesty king George the Second, or of this act, shall and they are hereby required to transmit annually, within sixty days after every thirty-first day of December in every year, to the said president and governors, a true and correct account of the receipts and expenditure during the year of such their several trusts, conformable to a form or plan to be prescribed and forwarded by the said president and governors, under the penalty of twenty pounds, to be recovered and recoverable before a magistrate or justice of the peace, as other penalties given by this act; and that such account of the receipts and expenditure of such trustees, together with an account of the receipts and expenditure of such president and governors, shall be annually laid before the honourable the House of Commons.

Collectors appointed by trustees or corporations aforesaid not to send duplicate of muster rolls to

XXIII. And be it further enacted, that nothing herein contained shall be construed to extend to oblige the receivers or collectors of the said duty appointed by the trustees of any of the said respective out-ports to send the duplicates of the muster rolls hereby directed to be delivered to the receivers and collectors of the said duties, in the manner hereinbefore mentioned, to the said president and

assistants or committees, for any vessels belonging to the ports where such payment shall be made, but such duplicates shall be delivered by such collectors or receivers to the said respective trustees, and to be by them filed and preserved for their use and inspection.

the president
and assistants.

XXIV. Provided always, and be it hereby declared, that no seaman, or other person employed on board any merchant ship, steam packets, or other private ship or vessel, shall be entitled to receive any provision or benefit by virtue of this act, at the port of London or elsewhere, unless he be subject or liable to the said duty hereby imposed, and shall pay the same when and where the same shall be required of him by virtue of this act.

No seaman to
have the bene-
fit of this act
unless he pays
the duty.

XXV. Provided also, and be it hereby declared, that those seamen who shall have been longest in the said service, and contributed most towards the said duties, shall be first provided for as worn out or decrepit.

Those who
have served
longest to be
first provided
for.

XXVI. And whereas it may happen that seamen, or other persons employed on board ships or vessels, may by accident, in loading or unloading the same, or otherwise by doing such duty on shore as well as on board such ships or vessels, receive such hurt or damage that it may endanger their lives to send them to the port to which the ships or vessels respectively belong; be it therefore further enacted, that in case any seaman or other person employed on board any merchant ship or private ship or vessel shall, in doing his duty on shore, or on board any such ship or vessel while in a port other than that to which the said ship or vessel shall belong, break an arm or leg, or be otherwise hurt or maimed, so that it is necessary that immediate care should be taken of him, it shall and may be lawful for the said president and governors at the port of London, and the respective trustees for the out-ports, as the case may be, and they are hereby required to provide proper relief for every such seaman or other person that shall be so hurt or maimed at their respective ports, until he shall be so well recovered from such hurt or damage as to be removed and sent with safety to the port to which the ship or vessel in which such seaman was at the time of the accident employed shall belong; and the expense of relieving and maintaining such seaman until he be so removed as aforesaid, and also the expense of removing him, not exceeding twopence per mile, shall be repaid to the said president and governors at the port of London, or to the trustees, if any, for the respective out-port at which the accident shall have happened, by the trustees of the port to which such ship or vessel shall belong.

Maimed sea-
men to be pro-
vided for at the
port where the
accident hap-
pens.

XXVII. And be it further enacted, that in case any seaman or other person shall serve five years or more on board merchant or other ships or vessels belonging to different ports, and shall have paid the monthly duties for that entire period, and shall have become decrepit and worn out, and adjudged either by the said president and assistants or committees, or by the trustees at any of the out-ports, a proper object of relief, such person shall be provided for and relieved at the port where he shall have contributed and paid the greatest part of the said duties for the last five years of his service, anything herein contained to the contrary notwithstanding.

Disabled sea-
men having
served and
paid five years
to be provided
for where they
have contri-
buted most.

XXVIII. And whereas it may happen that seamen or other per- Seamen who

have been
shipwrecked,
or made
prisoners by
the enemy, may
be relieved.

sons employed in the merchant service within the limits of this act may be shipwrecked, or taken by the enemies of his Majesty, and on their return from shipwreck or imprisonment may be returning with passes to the places of their respective abodes; be it further enacted, that it shall and may be lawful for the said president and governors, or the respective trustees, if they think fit, to relieve any such seaman or other person in such manner as they shall think proper.

Where regular
certificates
cannot be ob-
tained, others
may be ad-
mitted.

XXIX. And whereas there may be some circumstances wherein some of the respective certificates hereinbefore mentioned cannot be obtained; be it therefore enacted, that in all cases where the certificates directed to be produced by this act for the purpose of entitling the parties producing the same to relief and support cannot be obtained, such other certificates as shall be satisfactory to the said president and governors or trustees respectively shall be received and allowed so as to entitle the party producing the same to the pensions or other relief provided by this act.

Wages of de-
ceased seamen
to be paid to
the trustees of
the port on
ship's arrival,
to the use of
the executor,
&c.

XXX. And be it further enacted, that all and every sum and sums of money which shall be due for wages to any seaman, mariner, or other person hired or engaged on board any British merchant ship in any port or ports in Great Britain or Ireland, who shall have died on board during the voyage, shall, within three months after the arrival of such merchant ship in any port or ports of Great Britain and Ireland, be paid to the trustees of the said port to be appointed in pursuance of this act, or to the receiver or collector or other authorized agent of the said president and governors, where there are no such trustees, to and for the use of the executor or executors, administrator or administrators of the seaman, mariner, or other person so dying; and in case no claim shall be made on the said trustees by the executors or administrators of such seaman, on account of such wages, within one year after the same shall have been paid over as aforesaid, that then the said trustees of the said port shall remit the same to the collector or receiver of the said president and governors, or other their authorized agent at the port of London, in such manner and at such times as the said president and governors shall direct, to and for the use of the executor or executors, administrator or administrators, of the seaman, mariner, or other person so dying; and in case no claim shall be made on the said president and governors by the executors or administrators of such deceased seaman, on account of such wages, within one year after the same shall have been first paid over to any collector, receiver, or agent of the said president and governors, then it shall be lawful for the said president and governors to direct such wages to be paid over (but without interest for the same) to the widow, or if there be no widow claiming, then to the lawful issue respectively, or such persons as by virtue of the statutes of distribution of intestate's effects shall be entitled to the same; and if any master or commander of any such merchant ship shall neglect or refuse to pay over or tender to the said trustees, or the receiver or collector at the port aforesaid, all and every such sum and sums of money within the time hereinbefore limited, he shall forfeit and pay for every such offence double the amount of the sum or sums of money so due to any seaman, mariner, or other person for wages aforesaid.

XXXI. Provided always, and be it further enacted, that all and every such sum and sums of money as shall not be lawfully demanded of the said receiver, collector, or other authorized agent of the said president and governors at the port of London by any legal representative, or widow or issue, or other person hereby authorized, as the case may be, within the term of two years after the first payment thereof to any collector or agent of the said president and governors, shall be forfeited, and shall go and be paid to the use of the said president and governors, or to the trustees of the port, if any, to which such ship belongs, by such receiver, collector, or other authorized agent of the said president and governors at the port of London aforesaid.

If not demanded in three years by representatives, then to the use of the president and governors, or the trustees of the respective ports.

XXXII. And whereas by an act passed in the last session of this present Parliament, intituled "An Act for Incorporating the Members of a Society commonly called 'The Seamen's Hospital Society'; and their Successors, as therein is mentioned and provided, and for the better enabling and empowering them to carry on the charitable and useful Designs of the said Society," a certain society was incorporated by the name of "The Seamen's Hospital Society:" and whereas the said society was instituted for the charitable relief of sick and distressed seamen in the port of London, and for the providing them with medical and surgical aid, lodging, support, and clothing until convalescent: and whereas it is expedient to provide some permanent funds for enabling the said society to carry on their said charitable designs; be it therefore enacted, that the said president and governors, and their successors, or their treasurer, or other officer for the time being on their behalf, shall and do, from and after this act shall take effect, from time to time pay over to the said Seamen's Hospital Society, or their treasurer for the time being, the amount of five pounds in every one hundred pounds, and in the same proportion for any greater or less sum, on the net amount to be collected and received by the said president and governors and their successors, and by their receiver, collector, or other authorized agent at the port of London for the aforesaid duties of two shillings *per mensem* and one shilling *per mensem* hereby made payable, so far as the same shall be derived from the duty imposed upon seamen, or in respect of the wages of seamen, in such ships or vessels as shall belong to the said port of London, such payments to be made to the said Seamen's Hospital Society, or their treasurer for the time being, every three months, that is to say, on the day of . . . on the day of . . . on the day of . . . in every year; and the first of such payments to be made on such of the said days as shall happen next after this act shall take effect; all such payments to be applied by the said Seamen's Hospital Society, according to the directions of the aforesaid act of the last session of this present Parliament.

President and governors to pay five per cent. out of the duties received by them from seamen in the port of London to the Seamen's Hospital Society in that port.

XXXIII. And be it further enacted, that it shall and may be lawful to and for the said receiver or collector, or other authorized agent of the said president and governors at the port of London aforesaid, and he is hereby authorized, to deduct and receive from the gross amount of such sum or sums of money as shall be derived from the unclaimed wages of deceased seamen, so received by him in respect of such wages of deceased seamen as aforesaid, the sum of

Five per cent. to be deducted from gross amount in lieu of expenses, &c.

five pounds per centum as, for, and in satisfaction of all expenses and trouble he may be put to in the receipt, collection, or transmission thereof.

Application of penalties.

XXXIV. And be it further enacted, that all penalties and forfeitures given by this act shall be paid and applied in manner following, that is to say, one-third part thereof to and for the person or persons who shall inform and sue for the same, and the other two-third parts thereof to the said president and governors, on account of the trustees of the port to which such ship or vessel in respect of which the forfeiture shall arise belongs; and such penalty or forfeiture shall be recovered by bill, plaint, or information in any of his Majesty's courts of record at Westminster, or such of them as do not exceed the sum of twenty pounds, upon information, on the oath of one or more witnesses, before any one or more of his Majesty's justice or justices of the peace in any part of the kingdom of Great Britain or Ireland, who shall not reside more than ten miles from the place of abode of the person or persons complained of; which justice or justices is and are hereby authorized and required to issue out his or their warrant or warrants to bring before him or them every person charged with any offence under this act, and in case he or they shall refuse or neglect to pay such penalties or forfeitures as aforesaid, to issue his or their warrant or warrants to levy the same by distress and sale of the offender's goods, and in case no distress can be found, to commit the offender or offenders to the common gaol of the city, town, or place within the jurisdiction of such respective justice or justices, there to remain for the space of three calendar months, or until he or they shall pay the same.

Limitation of actions.

XXXV. And be it further enacted, that if any action shall be brought or suit be commenced against any person or persons for any thing done in pursuance of this act, or in relation to the premises or any of them, every such action or suit shall be laid or brought within two calendar months next after the grievance committed in the county or place where the fact was done, and not elsewhere; and the defendant or defendants in such action may plead the general issue, and give this act, and a tender of amends before action brought, or the special matter, in evidence at any trial to be had thereupon, and that the act or matter was done in pursuance and by the authority of this act; and if the same shall appear to have been so done, or if any such action or suit shall not be brought within the time before limited, and shall be brought in any other county or place than as aforesaid, or the jury shall not consider the aggrieved party entitled to more than the amends tendered, then the jury shall find for the defendant or defendants; or if the plaintiff or plaintiffs shall become nonsuit, or suffer a discontinuance of his, her, or their action or actions, or if a verdict shall pass against the plaintiff or plaintiffs, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall have double costs, and shall have such remedy for recovering the same as any defendant or defendants hath or have for costs in other cases at law.

Public act.

XXXVI. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and others.

A List and Account of the Crew (including the Master and Apprentices) of the Ship _____ of the Port of _____ whereof _____ is Master, at the period of her departure from the Port of _____ in the United Kingdom, and on her return to the Port of _____ in the United Kingdom, and also of those who have joined the ship at any time during the voyage.

[illegible]

X X

No. XVII.

6 Geo. 4, c. 125.

*An Act for the Amendment of the Law respecting Pilots and Pilotage ;
and also for the better preservation of Floating Lights, Buoys, and
Beacons.*

WHEREAS ships and vessels have frequently been wrecked, and many lives and much property have been lost, from the ignorance or misconduct of persons taking charge of such ships and vessels as pilots: And whereas the master, wardens, and assistants of the guild, fraternity, or brotherhood of the most glorious and undivided Trinity, and of Saint Clement in the parish of Deptford Strond in the county of Kent, commonly called "The Corporation of Trinity House of Deptford Strond," have, as well by usage for more than three centuries, as by grants from the Crown, been empowered to appoint pilots, loadsmen or guides, to conduct ships and vessels into and out of and upon the river of Thames, through the North Channel, to or by Orfordness, and round the Long Sand Head, or through the Queen's Channel, the South Channel, or other channels, into the Downs, and from and by Orfordness and up the North Channel, and up the rivers Thames and Medway, and the several creeks and channels, belonging or running into the same, and to make such orders and constitutions as should be needful for the wholesome government of seafaring men, and maintenance and increase of navigation, and of all seafaring men within the said river of Thames; in pursuance of which powers the said corporation have from time to time appointed a sufficient number of pilots for the purposes before mentioned, and made orders for the better regulation and government of the same: And whereas there hath been time out of mind, and now is, a society or fellowship of pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, who have had the pilotage and loadmanage of all ships from the said places up the rivers Thames and Medway, which said society or fellowship have been confirmed by various acts of parliament, for regulating the pilots of the society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Ports pilots: And whereas by certain acts of parliament, and more particularly by an act passed in the fifty-second year of the reign of his late Majesty king George the Third, intituled, "An act for the more effectual regulation of pilots and of the pilotage of ships and vessels on the coast of England," certain additional powers and authorities were vested as well in the said corporation of Trinity House of Deptford Strond, and the said society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port pilots, as also in the corporation of the Trinity House of the ports of Hull and Newcastle respectively: And whereas a certain other act of parliament was passed in the fifty-fifth year of the reign of his said late Majesty king George the Third, intituled, "An act to relieve certain foreign vessels resorting to the port of London, in respect of pilotage, and to regulate the mode

52 Geo. 3, c.
39.

55 Geo. 3, c.
87.

of payment of pilotage on foreign vessels in the said port." And whereas the provisions of the said acts have been found inadequate and insufficient, and it is therefore expedient that the same should be repealed (except as hereinafter provided), and that the several provisions therein contained respecting pilots and pilotage should be improved and amended, and consolidated in one law: May it therefore please your Majesty, that it may be enacted, and be it enacted, by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said act passed in the fifty-second year of the reign of his late Majesty, and also the said act passed in the fifty-fifth year of the reign of his said late Majesty, and all and every the clauses, provisions, powers, penalties, forfeitures, matters and things, relating as well to pilots appointed by the said corporation of Trinity House of Deptford Strond, as to pilots of the fellowship of Dover, Deal and the Isle of Thanet, and to the pilotage by and regulation of all such pilots as aforesaid, and also as to the conduct of all persons in matters of pilotage, within the jurisdiction of the said corporation of Trinity House of Deptford Strond, and the liberty of the Cinque Ports, which are contained in any act or acts of parliament heretofore made, shall be and the same are hereby repealed: Provided always, that nothing in this act contained shall extend or be construed to extend to repeal so much of the said acts passed in the fifty-second and fifty-fifth years of the reign of his late Majesty, or either of them, as relates to any rates of pilotage due or to become due, or to any penalty or forfeiture incurred, or to be incurred, or any other act, matter or thing done or to be done before the commencement of the operation of the provisions of this act, in relation to any such matters and things as last aforesaid.

II. And be it further enacted, that from and after the passing of this act, it shall be lawful for the said corporation of Trinity House of Deptford Strond, and they are hereby required, after due examination, to appoint and license, under their common seal, fit and competent persons duly skilled to act as pilots, for the purpose of conducting all ships and vessels sailing, navigating and passing as well up and down or upon the rivers of Thames and Medway, and all and every the several channels, creeks, and docks thereof or therein, or leading or adjoining thereto, between Orfordness and London Bridge, as also from London Bridge to the Downs, and from the Downs westward as far as the Isle of Wight, and in the English Channel, from the Isle of Wight up to London Bridge; and all ships and vessels sailing, navigating, and passing as aforesaid (save and except as hereinafter provided), shall be conducted and piloted within the limits aforesaid, by such pilots so to be appointed and licensed, and by no other pilots or persons whomsoever: Provided always, that it shall be lawful for all pilots heretofore licensed by the said corporation of Trinity House of Deptford Strond, until the thirty-first day of January next after the passing of this act, and whilst their licenses shall respectively continue in force, but no longer, to pilot or conduct any ships or vessels within such limits as such pilots might lawfully have conducted and piloted the same

52 Geo. 3, c.
39.
55 Geo. 3, c.
87,
and all provisions in other acts relating to pilots and pilotage repealed.

But not as to rates and penalties due or incurred, or acts done before the operation of the provisions of this act.

The corporation of Trinity House of Deptford Strond to license pilots to act within certain limits.

Pilots heretofore appointed may act until the 31st January next.

immediately before the passing of this act; and the licenses so heretofore granted to such pilots respectively as aforesaid, shall, unless revoked or suspended, as hereinafter mentioned, continue in force notwithstanding this act, until the said thirty-first day of January, so that such pilots respectively do in all things conform themselves to the provisions of this act, and the bye-laws, rules, orders, and regulations hereinafter directed to remain in force, or to be established under the same.

No person shall be licensed by the corporation, except as herein specified, nor take charge of a ship drawing more than 14 feet water until he shall have acted three years, and have been then re-examined and again approved.

Penalty as well by the person acting, as by the person in command permitting him.

III. And be it further enacted, that no person shall be licensed by the said corporation of Trinity House of Deptford Strond as a pilot, who shall not have served as mate for three years on board of, or who shall not have been for one year in the actual command of a square-rigged vessel of not less than eighty tons register tonnage, as to licenses for the North Channel upwards, and not less than one hundred and fifty tons register tonnage, as to licenses for the North Channel, Queen's Channel, South Channel, or other channels downwards, or who shall not have been employed in the pilotage or buoyage service of the said corporation of Trinity House for seven years, or who shall not have served an apprenticeship of five years to some pilot vessel licensed under the said act passed in the fifty-second year of the reign of his said late Majesty, or under this act; and that no person so licensed shall take charge as a pilot of any ship or vessel drawing more than fourteen feet water in the rivers Thames or Medway, or any of the channels leading thereto or therefrom, until such person shall have acted as a licensed pilot for three years, and shall have been after such three years, on re-examination, approved of in that behalf by the said corporation of Trinity House, on pain of forfeiting ten pounds for every such offence, as well by the person acting as such pilot, as also by the master or other person having the command of such ship or vessel, who shall permit any such person to take charge as a pilot of the same, contrary to the provision aforesaid.

Pilots to pay annually 3*l.* 3*s.* and 6*d.* in the pound on their earnings;

IV. And be it further enacted, that each and every pilot already licensed by the said corporation of Trinity House of Deptford Strond, or to be licensed by the said corporation under the authority of this act (except only such pilots as have been or shall be so licensed by the said corporation upon their receiving certificates of examination by any sub-commissioners of pilotage), as in the said act of the fifty-second year of the reign of his said late Majesty king George the Third, and hereinafter directed in lieu and satisfaction of and for all the ancient and accustomed duties heretofore payable by such pilots to the said corporation, shall from time to time and at all times hereafter pay or cause to be paid to the said corporation, or to such person or persons as they shall appoint to receive the same on their behalf, the sum of three guineas, in the month of January yearly; and that each and every pilot so licensed, or to be licensed by the said corporation as aforesaid, as well upon receiving such certificates as aforesaid, as otherwise howsoever, shall also from time to time and at all times, from and after the first day of July next, pay or cause to be paid to the said corporation, or to such person or persons and at such places and times as the said corporation shall in that behalf appoint, a certain poundage of sixpence in the pound upon all the

pilotage earned by each and every of such pilots, from the said first day of July inclusive, on pain of forfeiture for default of any of the payments aforesaid, or for any concealment or fraud therein or relating thereto, double the amount payable, and of being suspended or dismissed from acting as a pilot, at the discretion of the said corporation; which said payments hereby directed to be made as aforesaid shall be carried to and applied to the purposes of the pilot's fund of the said corporation hereinafter mentioned.*

V. And be it further enacted, that it shall be lawful for the said corporation of Trinity House, of Deptford Strond, and they are hereby required to appoint from time to time (as often and for such periods as they in their discretion shall think fit) proper and competent persons, at such ports and places in England as they may think requisite (except within the liberty of the Cinque Ports, and all such other ports and places within or for which particular provision shall have been made by any act or acts of Parliament, or by any charter or charters for the appointment of pilots), not to exceed five nor less than three persons at each port or place for which any such appointment shall be made, which persons so to be appointed shall be called sub-commissioners of pilotage, and shall take the oath in the schedule hereunto annexed, marked (C.), for the faithful discharge of their duty; and such persons so to be appointed shall examine, and they are hereby authorized (so long as their respective deputations or appointments shall not be revoked or superseded by the appointment of other persons in their places) to examine into the qualification of persons to act as pilots for such respective ports and places, and the adjoining coasts specified in their respective deputations or appointments as aforesaid; and it shall be lawful for the said corporation, upon their receiving a satisfactory certificate under the hands of any three of the persons so to be appointed, where the whole number at any port or place shall consist of four or five, and of any two where the whole number shall consist of three, that the person examined as aforesaid is duly qualified to act for such port or ports and the adjoining coasts, to give a license to such person to act as a pilot within the particular limits (describing the same) for which he shall have passed such examination.

VI. Provided always, and be it further enacted, that it shall be lawful for the corporations of the Trinity Houses of the ports of Hull and Newcastle respectively, to appoint sub-commissioners of pilotage to examine pilots, and give licenses for them to pilot ships and vessels into or out of any ports, harbours, or places within the limits of their respective jurisdictions; anything in this act contained to the contrary notwithstanding: provided always, that such sub-commissioners as have been already appointed, either by the said corporation of Trinity House of Deptford Strond, or by the said corporations of the Trinity Houses of the ports of Hull and Newcastle respectively, under the authority of any act or acts of Parliament heretofore passed, shall continue to act in the same manner as if they were appointed under this act.

VII. And be it further enacted, that when and as soon as the said corporation of Trinity House of Deptford Strond shall have licensed pilots for any particular port or ports, and the respective coasts near

to be applied to the purposes of the pilot's fund.

The corporation of Trinity House shall appoint sub-commissioners to examine pilots at the requisite ports, and on their certificate of qualification may grant licenses.

The Trinity Houses of Hull and Newcastle may appoint sub-commissioners to examine pilots, &c. within their jurisdiction. Sub-commissioners already appointed shall continue to act.

Notice, of appointment of pilots by the

corporation of Trinity House of Deptford Strond, to be fixed up at the Trinity House, &c. after which no other pilot or person shall act.

the same as aforesaid, they shall cause notice of such licenses to be published by fixing up such notice in writing at the Trinity House and at the custom-house in London, and also at the respective custom-houses of the ports for which, and for the coasts near the same, such licenses shall be granted, and shall also afterwards cause such notice to be published in the *London Gazette*, and in one or more of the newspapers circulated in that part of the country where the ports shall respectively be situated, which publication in the *London Gazette* shall be good and sufficient evidence of such notice having been given; and from and after a time or times to be limited in the said notice, which shall not in any case, or in relation to any ships or vessels whatever, be less than six weeks from the publication thereof, as aforesaid, and shall be proportionably more at the discretion of the said corporation, in relation to ships and vessels engaged in foreign voyages at the time of such publication, all ships and vessels sailing, navigating, or passing into or out of the said respective ports, or upon the coasts thereof (save and except as herein-after mentioned) shall be conducted and piloted by such pilots only as shall be so licensed as aforesaid, and by no other pilots or persons whomsoever.

Corporation of Trinity House shall establish rates for pilotage performed by pilots licensed on certificates.

VIII. And be it further enacted, that it shall be lawful for the said corporation of Trinity-house of Deptford Strond, and they are hereby authorized and required to establish, vary, and alter from time to time, as circumstances shall render the same necessary, rates of pilotage, in relation to all pilotage performed in any river, port, or place, or upon any coast whatever, by any pilot or pilots already licensed, or who shall be licensed by the said corporation, upon their receiving certificates of examination from sub-commissioners of pilotage as aforesaid, which rates shall be regulated by and proportioned as well to the size and draught of water of the vessels, as to the distance piloted, the detention and responsibility of the pilot, and such other circumstances as the said corporation may think fit to take into consideration in fixing and establishing such rates; of which establishment or alteration of rates of pilotage notice shall be given, by hanging up printed tables thereof, corrected from time to time, as variations therein shall be made at the several custom-houses at the ports to which the said rates shall apply; and no greater or less rates, or other reward or emolument for such pilotage, shall under any pretence whatever be demanded, solicited, received, paid, or offered, on pain of forfeiting ten pounds for every such offence, as well by the person demanding, soliciting, or receiving, as by the person paying or offering such greater or less rates, reward, or emolument: provided that ships returning by distress of weather, contrary winds, or on account of accident, into ports in the districts of the Isle of Wight, Plymouth, and Falmouth, shall be subject to pay one-half of the common pilotage in the said ports.

Of which rates, tables shall be hung up at the custom-houses of the respective ports, and no greater or less rates shall be received or paid.

Majority of pilots, or any shipowner, being dissatisfied with the rates, may appeal to privy council.

IX. Provided always, and be it further enacted, that if the major part in number of the pilots who shall be licensed by the said corporation of Trinity House of Deptford Strond, for any particular port or place, in consequence of their receiving certificates of examination as aforesaid, shall be dissatisfied with the rates so established or altered for such port or place; or in case any owner of any ship

or vessel interested in any such rates shall be dissatisfied therewith, it shall be lawful for such parties respectively to appeal to his Majesty, his heirs, and successors, in his or their most honourable privy council, and for any committee of such privy council, calling to their assistance any such persons as they may think fit, to hear and determine the matter of such appeal or appeals, and to settle, alter, and regulate such rates as to them shall appear to be expedient, in case the matter of such appeal shall, in the discretion of the said privy council, or committee thereof, appear to require the making of any order therein.

X. And be it further enacted, that all and every the licenses to be granted under the authority of this act, by the said corporation of Trinity House of Deptford Strond, shall be granted in the first instance up to and until the thirty-first day of January next ensuing the date thereof, and no longer; and that the same licenses, and also all and every the licenses heretofore granted by the said corporation of Trinity-house of Deptford Strond, and which shall be in force at the time of the passing this act, shall and may be renewed and confirmed from year to year, up to and until the thirty-first day of January in every year, and no longer, at the discretion of the said corporation, such renewal and confirmation to be by indorsement on such licenses respectively, signed by the secretary to the said corporation for the time being, or by such other person or persons as shall or may be thereunto authorized by the said corporation.

Licenses to be granted for one year, and renewable.

XI. And be it further enacted, that all persons licensed to act as pilots, or in pilot vessels, by the said corporation of Trinity House of Deptford Strond, by virtue of this act, shall from time to time and at all times hereafter be subject to the regulations and government of the said corporation, who are hereby authorized and empowered, as well for ensuring the good conduct and constant attendance of such pilots upon their duty, as for enforcing the general purposes of this act, from time to time to make and frame all such bye-laws, rules, orders, regulations, and ordinances as they shall think fit, therein specifying and directing also what annual or other sums shall be paid by any such pilots to the sub-commissioners of pilotage, for the examination of such pilots, and for granting and renewing or confirming their licenses from time to time: and it shall be lawful for the said corporation respectively to annex such reasonable penalties and forfeitures for the breach of such bye-laws, rules, orders, regulations, and ordinances when made, as to them shall seem expedient in that behalf; and from time to time to annul, alter, and amend all or any of the existing bye-laws, rules, orders, regulations, and ordinances, and to make such other and new bye-laws, rules, orders, regulations, and ordinances as they shall think proper, so as such bye-laws, rules, orders, regulations, and ordinances be made conformable to the true intent and meaning of this act, and shall not be repugnant to the laws of this realm: provided always, that no bye-laws, rules, orders, regulations, or ordinances hereafter to be made by the said corporation, shall have force or effect before they shall have been examined, sanctioned, and approved by the Chief Justice of his Majesty's Court of King's Bench, or by the Chief Justice of his Majesty's Court of Common Pleas, the sanction and approbation of either of which

Corporation of Trinity House may make bye-laws and annex penalties for breach of them.

bye-laws to be sanctioned by the Chief Justice of the King's Bench or Common Pleas.

Chief Justices shall be verified under his hand and seal; and all and every such bye-laws, rules, orders, regulations, and ordinances, when so made and confirmed as aforesaid, shall be observed and kept and put in execution, and have the same force and effect and operation, to all intents and purposes, as if the same were respectively enacted by this act.*

Proposed bye-laws to be previously transmitted to the privy council and to the commissioners of customs, the latter of whom shall cause printed copies to be hung up at the custom-houses.

XII. And in order that all such bye-laws, rules, orders, regulations, and ordinances may be previously examined by the parties interested therein, be it further enacted, that copies of all such proposed bye-laws, rules, orders, regulations, and ordinances shall be transmitted to his Majesty's privy council, and to the commissioners of customs in London, three calendar months before the same shall be submitted to such Chief Justice as aforesaid; and the commissioners of the customs are hereby required, upon the receipt of such copy, to cause the same to be printed and hung up, as soon as the same can be done, in the several custom-houses of the principal ports in Great Britain, there to be open to the inspection of all persons interested therein at all seasonable times; and notice shall be given in the Gazette of such proposed bye-laws being so hung up for inspection as aforesaid.

Bye-laws confirmed, to be hung up in the custom-houses and the Trinity House.

XIII. And be it further enacted, that all such bye-laws, rules, orders, regulations, and ordinances as shall be so made and confirmed as aforesaid, shall be printed, and shall be hung up in some public or conspicuous place in the several custom-houses of the ports of England, within the limits for which the pilots respectively shall be licensed, and also at the Trinity House in London.

The lord warden of the Cinque Ports to license pilots to act within certain limits.

XIV. And be it further enacted, that from and after the passing of this act, it shall and may be lawful for the lord warden of the Cinque Ports and constable of Dover Castle, or his lieutenant for the time being, and they are hereby required to appoint and license fit and competent persons duly skilled as pilots, for the purpose of conducting all ships and vessels sailing, navigating, and passing from or by Dungeness, up the rivers Thames and Medway to London Bridge and Rochester Bridge, and all and every the several channels, creeks, and docks of the same, and from the south buoy of the Brake to the westward, as far as the west end of the Owers; and all ships and vessels sailing, navigating, and passing as aforesaid (save and except

(a) In pursuance of which, bye-laws have been made, and have been sanctioned by the Chief Justice of the King's Bench. The following extract from them is here inserted, as being of general interest to the owners and masters of ships: Clause 6th, "It is ordained, that every pilot who shall have taken charge of any ship from the river Thames to the Downs, or elsewhere, shall without any additional compensation in that behalf, wait on board for the space of three complete days while such ship may be detained at Gravesend, or elsewhere, for want of seamen or by any other casualty, nor shall he at the end of three complete days be at liberty to quit such ship, or receive any additional compensation, if she shall be further detained by winds, weather or tides, and should the ship be detained beyond three complete days on any other account, except winds, weather, or tides, the pilot having the charge thereof, shall nevertheless still (if required so to do) remain in the charge of her, provided a compensation of six shillings per day be offered to him in that behalf by the master or owner."

as hereinafter provided), shall be conducted and piloted within the limits aforesaid, by such pilots so appointed and licensed, and by no other pilots or persons whomsoever: provided always, that it shall be lawful, after the passing this act, for any pilot or pilots heretofore licensed by the said lord warden and constable for the time being, or his lieutenant for the time being, to pilot or conduct any ship or vessel within such limits as such pilot or pilots might lawfully have conducted and piloted the same immediately before the passing of this act; and the licences so heretofore granted to such pilots as aforesaid shall continue in force notwithstanding this act, so that such pilots do in all things conform themselves to the provisions of this act, and the rules and regulations hereinafter directed to remain in force or be established under the same.

Existing licences to continue in force.

XV. And be it further enacted, that no person shall, from and after the passing of this act, take charge of any ship or vessel, as a pilot belonging to the society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port Pilots, before he shall be examined by the master and two wardens, or by four wardens of the said society or fellowship for the time being touching his abilities, and shall be approved and admitted into the society or fellowship of the Trinity House of Dover, Deal, and the Isle of Thanet, by the lord warden of the Cinque Ports, and constable of Dover Castle for the time being, or his lieutenant for the time being; and if any person shall presume to act as a pilot belonging to the said society or fellowship, without having been so examined, approved, and admitted as aforesaid, every such person shall for the first offence forfeit ten pounds, for the second twenty pounds, and for every other offence forty pounds.

No person shall take charge of any ship as a Cinque Port pilot, till he has been examined and admitted.

Penalty.

XVI. And be it further enacted, that no person belonging to the said society or fellowship of pilots of Dover, Deal, and the Isle of Thanet, commonly called Cinque Port Pilots, shall, from and after the passing of this act, be allowed to take charge as a pilot of any ship or vessel drawing more than eleven feet six inches water, until he shall have been licensed and acted as a pilot for three years; or of any ship or vessel drawing more than fourteen feet water, until he shall have been licensed and acted as a pilot for two years more, making five years; or of any ship or vessel drawing more than seventeen feet water, until he shall have been licensed and acted as a pilot two years more, making seven years in the whole; and at the expiration of such period of seven years, such pilot shall be again examined as to his fitness and competency, and if he shall be approved of, and licensed on such examination, shall be authorized and allowed and entitled to take charge of any ships or vessels of any draught of water.

Nor of ships drawing more than 11 feet 6 inches, until he shall have been licensed and have acted three years; 14 feet, five years; and 17 feet, seven years.

XVII. And be it further enacted, that the master, and such wardens of the said society or fellowship of pilots of the Trinity House of Dover, Deal, and the Isle of Thanet, as shall be appointed from time to time to examine into the skill and ability of any person on his being first admitted as a pilot into the said society or fellowship, or after he shall have been licensed and served for seven years, shall take the oath marked (B.) in the Schedule hereunto annexed, to be administered unto him or them respectively by the registrar of

Master and wardens of the fellowship appointed to examine pilots shall take the oath in schedule marked (B.)

the court of Loadmanage, who is hereby authorized to administer such oath.

A number of Cinque Port pilots shall constantly ply at sea to take charge of ships coming from the westward; and upon signals of fleets, all pilots shall prepare to go off.

XVIII. And be it further enacted, that a proper and sufficient number of pilots of the Cinque Ports, not less than eighteen at any one time, and in succession from time to time, without intermission or any unnecessary delay, shall at all seasonable times, by day and night, constantly ply at sea, or be afloat between the South Foreland and Dungeness, to take charge of ships and vessels coming from the westward; and such pilots shall not allow any ship or vessel, having a signal for a pilot flying, to pass without attempting to board her; and that upon proper signals being made at and from signal houses now erected, or which may be erected on commanding situations near to Dover for that purpose, giving notice of the approach of any fleet of ships or vessels coming from the westward, all Cinque Port pilots not on duty at the time shall, according to such rules and regulations as to number, rotation, or otherwise, as have been or shall be made in that behalf, forthwith prepare to go afloat, and shall go off in sufficient time to fall in with such ships and vessels, on pain of forfeiting, in case of neglect herein, for the first offence the sum of twenty pounds, and for the second the offender shall be suspended from acting as a pilot for twelve months, and for the third offence shall forfeit his license to act as such pilot, and shall be rendered thereby incapable of acting thereafter as a pilot.

Masters of ships from the westward not having a pilot shall display a signal for one, and facilitate his getting on board.

XIX. And be it further enacted, that the master or other person having the command of any ship or vessel, coming from the westward, and bound to any place in the rivers of Thames or Medway, not having a duly qualified Cinque Port pilot on board, shall, on the arrival of such ship or vessel off Dungeness, and until she shall have passed the south buoy of the Brake, or a line to be drawn from Sandown Castle to the said buoy, or have been at anchor for one hour, as hereinafter mentioned, display and keep flying the usual signal for a pilot to come on board; and if any duly qualified Cinque Port pilot shall be within hail or approaching and within half a mile, with the proper distinguishing flag flying in his vessel or boat, the master or other person having the command of such ship or vessel shall, by heaving to in proper time or shortening sail, or by all practicable means consistently with the safety of the ship or vessel, facilitate such pilot getting on board, and shall give the charge of piloting his ship or vessel to such Cinque Port pilot; and every person commanding any such ship or vessel, who shall not display and keep flying the usual signal for a pilot to come on board, from the time such ship or vessel shall have arrived off Dungeness, and until she shall have passed the south buoy of the Brake, in a line to be drawn from Sandown Castle to the said buoy, (unless in the meantime a duly qualified Cinque Port pilot shall have come on board), or who shall within the limits aforesaid decline to take on board the first duly qualified Cinque Port pilot who shall offer, or to give charge of his ship or vessel to such duly qualified Cinque Port pilot, or who shall not heave to, shorten sail, or otherwise consistently with the safety of the ship or vessel facilitate such pilots coming on board as aforesaid, shall forfeit and pay double the amount of the sum which would have been demanded for the pilotage of such ship or vessel: provided always,

Penalty.

that if any ship or vessel coming from the westward, and bound to any place in the rivers Thames or Medway, shall anchor any where in the Downs between the South Foreland, and a line drawn from Sandown Castle to the south buoy of the Brake, having any licensed pilot other than a duly qualified Cinque Port pilot on board, it shall not be necessary for the master of such ship or vessel to display or keep flying the usual signal for a pilot to come on board thereof, any longer than for and during one hour next after such ship or vessel shall so have anchored as aforesaid; and it shall be lawful for any duly qualified Cinque Port pilot at any time before such ship or vessel shall have been at anchor one hour with such signal flying as aforesaid, to repair on board the same, and to take charge of her up the said rivers, but not otherwise.

XX. And whereas the pilots of the Cinque Ports are divided into two parts or classes, called upper and lower book pilots; and whereas the permitting Cinque Port pilots of the lower book to take charge of ships which, before the passing of his said act of the fifty-second year of the reign of the said late Majesty king George the third, could only be taken by pilots of the upper book has diminished and will diminish the profits of the upper book pilots, and has increased and will increase the profits of the lower book pilots, and it is therefore reasonable that compensation should be made by the lower book pilots, to the persons who were at the time of the passing of the said last mentioned act upper book pilots; be it therefore enacted, that it shall be lawful for the court of Loadmanage from time to time to settle the amount of the deductions to be made from the rates received by lower book pilots, for taking charge of vessels of greater draught of water than they could before the passing of the said act by law take, and in what proportions and how and in what manner and to whom the same are to be paid, and how the same shall be applied in making compensation to the persons who were upper book pilots at the time of the passing of the said act, for the losses they may sustain by such lower book pilots taking charge of such vessels as aforesaid, provided that such deductions so to be fixed as aforesaid shall from time to time be diminished and decreased as such persons who were so upper book pilots at the time of the passing of the said act shall die, be superannuated, or discontinue to act as pilots, and that such deductions shall be taken and accepted in lieu of all other allowances or contributions whatsoever from the said lower book pilots, except Trinity money, clerks fees, and for widows.

XXI. And be it further enacted, that all persons licensed or to be licensed to act as Cinque Port pilots shall from time to time and at all times hereafter be subject to the regulations and government of the lord warden of the Cinque Ports and constable of Dover Castle for the time being, and it shall be lawful for the master and wardens of the said society or fellowship of pilots of Dover, Deal and the Isle of Thanet, and the lord warden of the Cinque Ports and constable of Dover Castle for the time being, his lieutenant for the time being, and the deputy lieutenant for the time being, or either of them, with the assent of the commissioners of Loadmanage, or the major part of them, present at an assembly commonly called a court of Loadmanage to be held by the said lord warden or his deputy, as and when they shall

Ships anchoring within certain limits, not having a Cinque Port pilot, shall display a signal, and Cinque Port pilots may within an hour repair on board and take charge.

Court of Loadmanage to settle the compensation to be paid to upper book pilots by lower book pilots for being allowed to take charge of ships of greater draught.

Cinque Port pilots to be subject to the rules and regulations of the lord warden, &c.

see fit, or occasion shall require, to annul, alter or amend the rules and regulations of the said lord warden or court of Loadmanage, which shall be in force at the time of the passing of this act, and which are hereby directed to remain in force notwithstanding the same, and to make from time to time such other sufficient rules and orders for enforcing the due observance of the provisions of this act by all Cinque Port pilots, and for providing for the good government, constant attendance, and regulation of all such pilots in going off to and taking charge of, and conducting and navigating his Majesty's ships and vessels, and the ships and vessels in his Majesty's employ, and also all ships and vessels whatever and wheresoever, within the proper and usual limits of such pilots, or wherein they shall for the time being act or be; and for effectually securing the performance of all the duties and services of such pilots at all times, and all alterations and amendments in such rules and regulations so in force as aforesaid, and all other rules and regulations, or alterations or amendments thereof, hereafter to be made, shall, before the same are allowed to take effect, or become binding on any person or persons whatever, be printed and transmitted to the custom-house in London, and there hung up in some conspicuous place in the long room of the said custom-house; and notices shall be published in the *Gazette*, and put up at the custom-houses within the Cinque Ports, of such rules and regulations, or any alterations thereof, for inspection, for one calendar month, in order that any persons interested therein, whether as owners or masters of ships, or pilots, or otherwise, may transmit to the lord warden of the Cinque Ports, or his lieutenant, any objections which they may have thereto, for the purpose of the same being altered or confirmed; and if no objection to the rules and regulations so made or altered shall be proposed, by or on the behalf of any person or persons, within the space of thirty days after the notices shall have been given and made public, in the manner hereinbefore provided, they shall have the same force and effect to all intents and purposes as all other rules and regulations for the government of pilots within the jurisdiction of the Cinque Ports have; but if an objection shall be made to the lord warden, or his lieutenant, by or on behalf of any person or persons, to any rule or regulation, or to any alteration in any rule or regulation, of which notice shall be given as aforesaid, within thirty days after the publication thereof, then and in such case the operation thereof shall be suspended until reference shall be had to his Majesty's most honourable privy council, who are hereby authorized and empowered to hear as well any person who shall be deputed by the court of Loadmanage as by the person or persons objecting, and finally to decide as to the confirming, altering or rejecting such rules or regulations, which decision of the privy council shall be final and binding on all parties; and copies of such rules or regulations shall be delivered to every member of the said society or fellowship, and also to every new member of the said society on his election; and a copy or extract thereof shall be at all times in the possession of every pilot belonging to the Cinque Ports, as well those already admitted and licensed as all others hereafter to be licensed as such pilots; and it shall be lawful in such rules and regulations to establish rates of payment out of such surplus earnings of the lower

book pilots, as may arise from their being allowed to take the higher classes of ships, in the absence of pilots of the upper book, under the provisions of this act, for the better support and maintenance of the upper book pilots, and also penalties and forfeitures for the enforcing such rules and regulations, and better ordering of the said pilots, and for suspending or depriving any of the said pilots of their licences for breaking such rules or orders, or omitting to do any thing required by the same to be done, or for acting in anywise contrary to such rules or orders.

XXII. Provided always, and be it further enacted, that if any such rules and regulations so hereafter to be made in relation to Cinque Port pilots as aforesaid shall appear to be in any material point erroneous, insufficient or defective, it shall be lawful for the owner of any ship, or other person interested in the matter of such rules or regulations, to apply to his Majesty's most honourable privy council, who shall thereupon amend, correct or enlarge the same, or cause such other proper and sufficient rules and regulations to be drawn up for the purposes aforesaid; which rules and regulations so made, or so amended, corrected and enlarged, shall be distributed, published and made use of in such manner as his Majesty's said privy council shall in that behalf appoint and direct; and the same shall take effect from such time as in the said rules or regulations shall be expressed in regard to the commencement thereof.

If such rules shall be defective, the privy council shall amend, correct, or enlarge the same.

XXIII. And whereas under the provisions of an act passed in the forty-eighth year of the reign of his said late Majesty king George the third, intituled, "An Act for the better regulation of Pilots, and of the Pilotage of ships and vessels navigating the British seas," the number of pilots of the Cinque Ports was increased to one hundred and forty, and it hath been found that the said last mentioned number is at present, in the time of peace, more than sufficient for the trade and navigation of this kingdom; be it therefore enacted, that until the number of such pilots shall by death or otherwise be reduced below one hundred and twenty, or shall be added to, as hereinafter mentioned, it shall not be lawful for the said lord warden and constable of Dover Castle, or his lieutenant for the time being, without special permission in that behalf given by his Majesty's most honourable privy council, upon the recommendation of the said corporation of Trinity House of Depford Strond, to fill up any more than each alternate vacancy which shall arise in the number of such pilots: provided always, that twenty Cinque Port pilots more, or any less number of such pilots, shall and may be added to the then existing number whenever such addition shall be directed to be made by an order of such privy council, upon application thereto for that purpose by the said corporation of Trinity House, and in like manner from time to time, so as the number of Cinque Port pilots shall not at any one time exceed one hundred and eighty, of which said reduction or additions respectively notice shall be given by or under the authority of the lord warden of the Cinque Ports, in the *London Gazette*, and in one or more newspaper or newspapers circulating in the counties of Middlesex and Kent.

As to the number of Cinque Port pilots, and how and when to be increased.

XXIV. And be it further enacted, that whenever such additions to the number of the said pilots shall respectively take place, as herein-

The increased number of

pilots shall be kept up. But in peace no more than each alternate vacancy shall be filled up without permission of privy council, unless number below 120.

Rates in tables (A. and B.) of schedule (A.) may be demanded by pilots, and no greater or less.

Penalty.

Rates may be varied by the corporation of Trinity House and lord warden of the Cinque Ports respectively, with the consent of the privy council.

before provided, the numbers so increased shall from thenceforth be kept up from time to time by the appointment of pilots in succession, as often as any vacancy or vacancies shall happen by death, incapacity, or dismissal: provided always, that in time of peace no more than each alternate vacancy in the number of Cinque Port pilots shall be filled up without a special permission in that behalf given by his Majesty's privy council, upon the recommendation of the said corporation of Trinity House, unless the number of such pilots shall, at the time of such filling up, be reduced below one hundred and twenty, in which case such vacancy shall and may be filled up from time to time without such permission as aforesaid.

XXV. And be it further enacted, that from and after the passing of this act, the respective rates or prices hereinafter enumerated in the tables marked (A. and B.) respectively in the schedule marked (A.) to this act annexed, shall and may be lawfully demanded and received by any pilot licensed or to be licensed by the said corporation of Trinity House of Deptford Strond, or by the lord warden of the Cinque Ports and constable of Dover Castle for the time being, or his lieutenant for the time being respectively, for the piloting or conducting of any ship or vessel from place to place, as expressed in the said tables respectively; that is to say, the respective rates or prices enumerated in the said table marked (A.) shall and may be demanded and received by any pilot licensed or to be licensed by the said corporation; and the respective rates or prices enumerated in the said table marked (B.) shall and may be demanded and received by any pilot licensed or to be licensed by the said lord warden of the Cinque Ports and constable of Dover Castle for the time being, or his lieutenant for the time being; and no greater or less rates or prices, or other reward or emolument shall under any pretence whatever be demanded, solicited, received, paid, or offered than such rates or prices, on pain of forfeiting ten pounds for every such offence, as well by the person demanding, soliciting, or receiving, as also by the person paying or offering such greater or less rate or price, reward, or emolument.

XXVI. Provided always, that it shall and may be lawful for the said corporation of Trinity House of Deptford Strond (as to the said rates or prices to be demanded and received by pilots licensed, or to be licensed, by the said corporation) and for the said lord warden of the Cinque Ports and constable of Dover Castle for the time being, or his lieutenant for the time being (as to the said rates or prices to be demanded and received by pilots licensed or to be licensed by the said lord warden and constable, or his lieutenant), and they are hereby respectively authorized and empowered from time to time, and at any time or times hereafter, with the consent of his Majesty, his heirs and successors, in his or their most honourable privy council, to increase, reduce, alter, or modify all or any or either of the said respective rates or prices so enumerated in the said tables respectively, or to substitute other rates or prices in lieu thereof, and the same rates or prices so increased, reduced, altered, modified, or substituted as aforesaid, again in like manner and with the like consent from time to time to increase, reduce, alter, or modify, or others to substitute in lieu thereof, and to fix and determine the period (so

that the same be not less than three calendar months from the giving of the notice hereinafter mentioned) from and after which such altered or substituted rates and prices are to be demanded, of which rates and prices, and of the period from and after which the same are to be demanded, notice shall from time to time be given, by hanging up printed tables thereof in some public or conspicuous place in the custom-house of London, and also at the Trinity House in London; and from and after the period specified in such last mentioned tables, the respective rates or prices therein enumerated may and shall be demanded and received by any pilot licensed by the said corporation of Trinity House, or by the lord warden of the Cinque Ports and constable of Dover Castle for the time being, or his lieutenant for the time being respectively, instead of the said several rates and prices mentioned in the said tables marked (A. and B.) respectively; and from and after such period, no greater or less rates or prices, or other reward or emolument, shall, under any pretence whatever, be demanded, solicited, received, paid, or offered, on pain of forfeiting ten pounds for every such offence, as well by the person demanding, soliciting, or receiving, as also by the person paying or offering such greater or less rate or price.

Penalty.

XXVII. And be it further enacted, that every person who shall apply for a license to act as a pilot by virtue of this act, shall, before any license shall be granted to him, execute a bond in a penal sum, at the discretion of the said corporation of Trinity House of Deptford Strond, or of the lord warden of the Cinque Ports and constable of Dover Castle for the time being, or his lieutenant for the time being (as the case may be) to an amount not exceeding one hundred pounds, to be paid to the said corporation, or to the society or fellowship of pilots of Dover, Deal, and the Isle of Thanet (as the case may be), their successors or assigns, with a condition subjoined thereto for better securing the due obedience of such pilot to the bye-laws, rules, orders, regulations, and ordinances made in pursuance of any act or acts of parliament heretofore passed, or which shall be made and framed pursuant to this act, which bond shall be capable of being given in evidence in any court of law or equity, without being stamped according to the laws relating to the stamp duties: provided always, that all bonds before given by pilots under any former act or acts of parliament shall continue in force, and be deemed to be given under this act, unless new bonds shall in any case be required by the said corporation, or by the said lord warden and constable, or his lieutenant respectively, in which case new bonds shall be given accordingly.

Persons applying for licenses shall execute a bond for securing obedience to bye-laws.

Bonds already given to remain in force.

XXVIII. And be it further enacted, that all bye-laws, rules, orders, regulations, and ordinances made under the said recited act of the forty-eighth year of the reign of his said late Majesty, or under the said recited act of the fifty-second year of the reign of his said late Majesty, or either of them, and which shall be in force under the same respectively at the time of the passing of this act, shall remain, continue and be in full force and virtue, until the same respectively shall have been annulled or altered, or other bye-laws, rules, orders, regulations or ordinances made in lieu thereof under this act, and shall be and are hereby declared to be good and valid

Bye-laws, &c. under former act to remain valid, unless altered by this act.

bye-laws, rules, orders, regulations, and ordinances under this act, as fully as if they had been made under the authority of the same ; any thing hereinbefore, or in any other act of parliament, to the contrary notwithstanding.

Licenses may be revoked, annulled, or suspended.

XXIX. Provided always, and be it further enacted, that as well every such license so granted, or to be granted, renewed, or confirmed, by the said corporation of Trinity House of Deptford Strond as aforesaid, as also every such license so granted or to be granted by the said lord warden of the Cinque Ports and constable of Dover Castle, or his lieutenant for the time being as aforesaid, shall and may be by the said corporation, or by the said lord warden and constable of Dover Castle, or his lieutenant for the time being respectively, annulled, suspended, or adjudged to be forfeited, in such manner and at any such time or times as to them the said corporation and lord warden, or his lieutenant for the time being respectively shall seem meet, as well during as at the end of the period for which such licenses respectively shall have been so granted, renewed or confirmed as aforesaid.

Pilots so suspended, &c., and persons complaining against them, may appeal to the Privy Council.

XXX. Provided, always, and be it further enacted, that every pilot whose license shall be revoked, annulled, suspended, or adjudged to be forfeited, or who shall be suspended from acting as a pilot, as hereinbefore or hereinafter mentioned, shall and may, at any time within six months next after such revocation, annulling, suspension, or adjudication shall have been made, and upon giving notice to the corporation or other authority by which such license shall have been so revoked, annulled or suspended, or such adjudication made as aforesaid, and every person who, having complained of any such pilot, shall be dissatisfied with the adjudication made upon the matter of such complaint by the corporation or other authority which shall have cognizance thereof, shall and may, at any time within six months next after such adjudication and upon giving notice to the corporation or other authority by which such adjudication was made, appeal to his Majesty's most honourable privy council, who shall thereupon hear the appeal, and confirm or annul any determination or adjudication in the premises, or at their discretion make any particular and special order relating thereto, and to the matter of such appeal, and the costs thereof, as the case may require.

Vessels to be licensed for having pilots in attendance at sea, &c.

XXXI. And be it further enacted, that it shall be lawful for the said corporation of Trinity House of Deptford Strond, and for the said society of fellowship of pilots of Dover, Deal, and the Isle of Thanet, and also for all other corporate bodies, or persons having lawful authority to appoint pilots within the limits of their respective jurisdictions, to license vessels of such size and description as shall appear to them to be proper, for the purpose of having pilots constantly in attendance in such vessels at sea, and to nominate and appoint, and from time to time to remove and again appoint the masters of such vessels respectively ; and for the better support of such pilot vessels, it shall be lawful for any number of pilots, licensed by virtue of this act, or otherwise lawfully licensed, with the consent of the said corporate bodies, or persons by whom respectively such pilots have been or shall be appointed as aforesaid, to constitute

a joint stock company or companies, for the providing and maintaining of such pilot vessels, which companies and the said vessels shall at all times be subject to such rules and regulations, as shall from time to time be sanctioned and approved in that behalf by the corporate bodies, or persons by whom respectively such pilots shall respectively have been licensed.

XXXII. And be it further enacted, that every pilot boat or vessel, or other boat or vessel, in the pilot service of any corporation or society established by law, in relation to pilotage, or of or belonging to any person authorized to act as a pilot by such corporation or society, shall at all times, and on every station, be fitted with black sides, and have the upper streak next the gunwale painted white, and shall while afloat carry a flag at the mast-head, or on a sprit or staff, or in some other equally conspicuous situation, which flag shall be of large dimensions, proportioned to the size of the boat or vessel carrying the same, and shall be half red and half white, in horizontal stripes, of which the uppermost shall be white, and the same shall at all times be kept and preserved in a clean and distinct condition, so as to be easily discerned at a proper and sufficient distance; and every such boat or vessel shall also have the name of the principal pilot thereof for the time being painted in broad white letters, of three inches in length, on a black ground, on her stern, and on each bow such number as shall be expressed in the license of such principal pilot, which name and number shall not be hid or concealed by any person at any time, on pain of forfeiting, for the omission or evasion of any of the provisions hereinbefore made in respect of such pilot boat or vessel, the sum of twenty pounds, to be paid by the senior pilot on board, who is hereby declared answerable for the due observance of the matters aforesaid, by every person on board such boat or vessel; and in case any pilot shall be carried off in any boat not in the service of any such corporation or society, such pilot shall exhibit a similar flag at the mast-head, or on a sprit or staff, to distinguish that such boat has a pilot on board, on pain of such pilot so carried off forfeiting the sum of twenty pounds, unless he shall show reasonable cause for having omitted to exhibit such flag.

How pilot boats are to be distinguished.

Penalty.

Pilot carried off in any other boat to display a flag.

XXXIII. And be it further enacted, that if any boat or vessel, not having a licensed pilot on board, shall without lawful authority carry such distinguishing flag as aforesaid, the owner or owners, or the master or other person having charge of such boat or vessel, displaying or carrying any such flag, shall for every such offence forfeit and pay a sum of one hundred pounds.

Penalty for carrying distinguishing flag without having a pilot on board.

XXXIV. And be it further enacted, that if any boat or vessel shall run before any ship or vessel not having a licensed pilot on board, when such ship or vessel cannot, from particular circumstances, be boarded for the purpose of directing her course, until a licensed pilot can be put on board, the pilot on board such boat or vessel, or if no pilot shall be on board, and the person having charge of her shall run her before such ship or vessel, at the request or by the direction of the master, or other person having the command thereof, then such person having charge of such boat or vessel shall be entitled to the full pilotage for the distance run, until a duly licensed pilot shall be put on board, as if such pilot, or person respectively,

Boat running before a vessel, not having a pilot, and which cannot be boarded, entitled to pilotage.

had been actually on board such ship or vessel, and had the charge of her as a pilot.

Name, &c. of pilots appointed to be transmitted to the Trinity House, and a list of all pilots annually to the Trinity House and Custom House.

XXXV. And be it further enacted, that from and after the passing of this act, all bodies politic and corporate, and all and every other person or persons, authorized to appoint or license pilots in or for any port of England, or any of the seas, coasts, harbours or rivers thereof, or places therein, shall from time to time, as and when each appointment of a pilot shall be by them respectively made, forthwith transmit to the corporation of Trinity House of Deptford Strond, at the Trinity House in London, and to the commissioners of his Majesty's customs, at the custom-house in London, the christian and surname, age and place of residence of every such pilot so appointed, distinguishing the limits within which such pilot is appointed to act, and by whom such appointment is made; and the said bodies politic and corporate, and other persons authorized to appoint and license pilots as aforesaid, shall and they are hereby required to transmit to the said corporation of Trinity House, and the Trinity House, aforesaid, and to the said commissioners of customs, at the custom-house aforesaid, annually, on the thirty-first day of December, or within one calendar month afterwards, a list corrected up to the said thirty-first day of December in each year, of the names and residences of all the pilots within their several jurisdictions, in which list so to be transmitted to the Trinity House as aforesaid shall be stated all such alterations (if any,) as may have been made in the rates of pilotage charged, or in the rules and regulations for governing pilots within their respective districts.

Commissioners of customs to transmit to their principal officers at ports in England the names, &c. of pilots residing within the limits of each port.

XXXVI. And whereas by certain acts of parliament for the more effectual performance of quarantine, pilots are required, on going on board ships arriving from foreign parts, in certain cases to give information to the commanders thereof respecting proclamations and orders in council relative to the performance of quarantine, which renders it necessary that notice of such proclamations and orders should have been previously communicated to all pilots throughout England; be it further enacted, that the said commissioners of his Majesty's customs shall from time to time with all convenient speed transmit to the principal officers of the revenue under their management at the several ports in England, the names and places of residence of all such pilots of whose nomination they shall receive notice from the proper authority, or who shall be in the list so annually to be transmitted to such commissioners as aforesaid, as shall reside within the limits of each port respectively, in order that the said principal officers at the several ports may be enabled to communicate and deliver to every pilot within the limits of such port respectively copies of all proclamations or orders in council respecting the performance of quarantine by ships arriving from infected places, which the said officers are hereby required to communicate accordingly.

List of vessels employed for pilotage, with the number of hands, to be

XXXVII. And be it further enacted, that the said corporation of Trinity House of Deptford Strond, and the court of Loadmanage of the Cinque Ports, and all other corporations and persons authorized to manage or direct pilots in any part of England, under the authority of any act of parliament or charter whatever, shall annually,

on the first day of January in every year, or within one calendar month then next following, transmit to the office of the receiver of the sixpenny duty in the port of London a list of all the vessels of every description employed by them respectively, or by persons under their authority, for the purposes of pilotage, with the number of men and boys belonging to or serving in any such vessels.

annually transmitted to the receiver of sixpenny duty in the port of London.

XXXVIII. And be it further enacted, that no pilot shall be taken to sea beyond the limits of his district by the commanding officer of any of his Majesty's ships, or by the master or other person having the command of any other ship or vessel whatever, without such pilot's free consent, except under circumstances of absolute and unavoidable necessity; and then and in such case every pilot so taken to sea shall over and above his pilotage have and receive ten shillings and sixpence *per diem*, to be computed from and inclusive of the day next after the day on which the ship or vessel shall pass the limit to which such pilot was engaged to pilot her up to, and until he shall be returned to the port or place where he was taken on board, or until he shall have been discharged from the ship for a sufficient time to have enabled him to return there.

No pilot shall be taken to sea beyond his limits, without his consent, except in case of necessity, and then he shall receive 10s. 6d. per diem above his pilotage.

XXXIX. And whereas certain harbours near the Downs have become much frequented as places of safety, and ships and vessels lying in or sailing through the Downs are oftentimes compelled to run for those harbours, and it is therefore necessary to make provision for the pilotage into and out of such harbours; be it therefore enacted, that all pilots whose licenses shall authorize them to pilot ships or vessels from any place to the westward up to London Bridge, shall qualify themselves, and shall be examined as to their qualification and ability to conduct any ship or vessel into and out of Ramsgate harbour, and the harbours of Dover, Sandwich, and Margate, and shall be obliged to pilot any ships or vessels into and out of any of the said harbours; and if any such pilot shall refuse to take charge of or conduct any ship or vessel into or out of any of the said harbours, such pilot shall forfeit all pay and reward to which he might otherwise have been entitled for the pilotage of any such ship or vessel, and shall be subject to such fine or other punishment as shall be established in that behalf by the bye-laws, rules, orders, regulations, or ordinances of the corporation, or other authority, from which the license of such pilot shall have been derived.

Pilots shall qualify themselves, and conduct ships into and out of Ramsgate and other harbours.

Penalty for refusal.

XL. Provided always, and be it further enacted, that every licensed pilot who shall take charge of and conduct any ship or vessel into or out of Ramsgate harbour, or into or out of the harbours of Dover, Sandwich, or Margate, shall be entitled to and shall receive for such pilotage at and after the rate of five shillings for every foot of the draught of water of the ship or vessel so piloted and conducted by him into or out of any such harbours.

Rates for such pilotage.

XLI. And be it further enacted, That the master or other person commanding any ship or vessel bound to the river Thames, and which shall repair to Standgate Creek, or any other place appointed for the performance of quarantine, shall pay the full charges of pilotage up to Standgate Creek, or other the place so appointed, and the pilot conducting such ship or vessel to Standgate Creek, or other the place so appointed as aforesaid, shall be entitled to the further sum

Ships bound to the Thames repairing to places for performance of quarantine, to pay full charges of pilotage, &c.

of eight shillings *per diem* for the days he shall be obliged to remain on quarantine.

Pilots quitting ships in the Thames or Medway, without consent before arrival at the place to which bound, to forfeit pay, and be liable to penalty.

XLII. And be it further enacted, That if any pilot taking charge of any ship or vessel into the river Thames or Medway, shall quit such ship or vessel at Gravesend or Standgate Creek, or in any other part of the Thames or Medway respectively, before such ship or vessel shall have arrived at the place to which she is bound in the said rivers respectively, without the consent of the captain or other person having the command thereof, unless some other duly qualified pilot shall with such consent come on board, and shall take the charge and conduct of such ship or vessel for the residue of the pilotage to be performed, every such pilot so quitting such ship or vessel, shall forfeit for every such offence all pay or reward to which he might be entitled for having conducted or piloted such ship or vessel to Gravesend, Standgate Creek, or such part of the Thames or Medway respectively as aforesaid, and shall also be subject to such other penalty or punishment as by virtue of any of the provisions of this act, or of the bye-laws, rules, orders, regulations, and ordinances hereby directed to remain in force, or which may be made or established in pursuance hereof, any pilots shall be liable to for quitting a ship or vessel before she shall arrive at her place of destination.

Pilot to write his name in in log-book, and same to be inserted in report of ships entering the port of London, and reported daily to the Trinity House, and monthly to the lord warden of the Cinque Ports.

XLIII. And be it further enacted, That every pilot shall write his christian and surname in the log-book of every master or other person having the command for the time being of any ship or vessel entering the port of London, and required to be piloted according to the directions of this act; and every pilot or other person inserting a false name shall forfeit the sum of twenty pounds; and the master or other person having the command of such ship or vessel shall, in making the entry or report of such ship or vessel inwards, insert, or cause to be inserted in such entry or report, the name or names of the pilot or pilots employed or engaged to pilot such vessel into the said port, which insertion shall be made in the said entry or report, (without fee or reward) by the proper officer of the customs, who shall report the same to the corporation of the Trinity House daily, and to the lord-warden of the Cinque Ports monthly; and such officer is hereby authorized and required to reject such entry or report, unless and until the name or names of the pilot or pilots so employed or engaged as aforesaid shall be inserted or notified to such officer for insertion in such entry or report as aforesaid; and also that the principal searcher or clearing officer of the customs at Gravesend, shall demand and take the name or names of the pilot or pilots of all ships or vessels clearing outwards from the port of London, and shall transmit monthly lists of such names to the said corporation of Trinity House, on pain of forfeiting a sum not exceeding ten pounds, nor less than five pounds, to be paid by each and every of the persons aforesaid, who shall neglect to comply with any of the foregoing regulations.

Monthly reports to be made of vessels clearing outwards

Penalty.

How pilotage of ships, except those not having British registers, trading to and from the

XLIV. And be it further enacted, That all sums of money which shall become due to any licensed pilot, for the pilotage of any ship or vessel, except ships and vessels not having British registers, trading to and from the port of London, shall and may be recovered from the owners or masters of such ship or vessel, or from the con-

signees or agents thereof, who shall have paid or made themselves liable to pay any other charge for the said ship or vessel in the port of her arrival or delivery, as to pilotage inwards, and in the port from whence she shall clear out or sail as to pilotage outwards; which sums of money shall and may be levied in such and in the like manner, according to the amount of any such sums of money as aforesaid respectively, as any penalty or penalties of the like amount may be recovered and levied under and by virtue of this act, demand thereof being made in writing at least fourteen days before such levy.

port of London, may be recovered.

XLV. And be it further enacted, That the consignees or agents of any ship or vessel, from whom any sum of money due to any licensed pilot for pilotage shall have been recovered, or shall be recoverable, or by whom any such sum of money shall have been paid, are hereby authorized and empowered to retain in their hands respectively, out of any monies which they may have received, or shall thereafter receive, for or on account of such ship or vessel, or the owner or owners thereof, so much as shall be sufficient to pay and discharge such pilotage, and any expenses attending the same.

Consignees or agents may retain pilotage which they have paid or are liable to.

XLVI. And in order to prevent as well impositions and disputes respecting the charges for, as evasions in the payment of the pilotage of such ships and vessels trading to and from the port of London, and not having British registers, as are by law required to be piloted by pilots licensed by the said corporation of Trinity House, be it further enacted, that from and after the passing of this act, the master or other person having the charge of every such ship or vessel which shall enter into or sail from the said port of London, or the consignees of or agents for such ship or vessel, shall pay, or cause to be paid at the Trinity House in London, to such person or persons as shall from time to time be in that behalf appointed by the said corporation of Trinity House, the full pilotage inwards and outwards respectively of every such ship or vessel; that is to say, in all cases as to pilotage outwards, the full amount of pilotage for the distance which such ship or vessel shall by law be required to be piloted by such licensed pilot as aforesaid; and so far as concerns the pilotage inwards, where a duly licensed pilot shall have been on board such ship or vessel, the full amount of pilotage for the distance piloted by him, if greater than that which such ship or vessel shall be so required to be piloted; and if less, or if no such pilot shall have been on board, then the full amount of the pilotage for the distance which such ship or vessel shall be by law required to be piloted as aforesaid; and if such pilotage inwards be not paid within fourteen days from the day of such ship or vessel's reporting inwards, the same shall and may be recovered by the said corporation from the master or other person having the charge of every such ship or vessel, or from the consignees or agents thereof, who shall have paid or made themselves liable to pay any other charge for such ship or vessel in the said port of London, and shall and may be levied in such and the like manner, according to the amount of any such sums of money respectively, as any penalty or penalties may be recovered and levied under and by virtue of this act.

In what manner pilotage of ships not having British registers trading to and from the port of London shall be paid.

XLVII. And be it further enacted, That the person or persons

Certificate of payment of pilotage to be given.

Receivers to pay over to the pilot what shall be due to him ;

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and the residue with the poundage to be carried to the pilots' fund.

Corporation of Trinity House may, out of pilotage received, reward unlicensed persons who have piloted in the absence of a licensed pilot.

How the amount of pilotage outward of foreign vessels shall be ascertained.

How controversies respecting the draught of water, of

so to be appointed by the said corporation of Trinity House of Deptford Strond as last aforesaid shall, upon his or their receiving such pilotage, give to the person paying the same a certificate thereof in writing, and that no ship or vessel not having a British register, and being required by law to be piloted as aforesaid, shall be cleared at the office of his Majesty's customs in the said port of London, on her outward bound voyage, without the production of such certificate as aforesaid : and the said person or persons so to be appointed as aforesaid shall, upon proof to the satisfaction of the said corporation that such pilotage service hath been duly performed, pay over to the pilot duly licensed, who shall have had charge of every such ship or vessel, all such sum or sums of money as shall have been received by such person or persons appointed as aforesaid, and as shall be due and payable to such pilot for or in respect of such pilotage service so by him performed, after deducting and retaining thereof the poundage hereinbefore made payable to the said corporation ; and the residue of such pilotage received by such person or persons so appointed as aforesaid shall, together with the poundage aforesaid, be carried to and applied to the purposes of the pilots' fund of the said corporation of Trinity House of Deptford Strond hereinafter mentioned.

XLVIII. Provided always, and be it further enacted, That in any case where such pilotage shall have been received as aforesaid, for or in respect of any ship or vessel not having a British register, if it shall appear to the said corporation that no licensed pilot was in fact employed on board thereof, it shall and may be lawful to and for the said corporation, and they are hereby authorized, if they shall so think fit, out of such pilotage to make or give to any unlicensed person or persons who shall have piloted or assisted in piloting such ship or vessel during so long time as no licensed pilot shall, to the knowledge of such unlicensed person or persons, have offered to take charge thereof, such compensation or reward as in the discretion of the said corporation they shall deem proper in that behalf, not exceeding the sum which would have been payable to a duly licensed pilot.

XLIX. And in order the better to facilitate the ascertaining and settling the amount of the pilotage outward of ships and vessels not having British registers, in the port of London, under the authority of this act, be it further enacted, That the rates or amount of pilotage outward, to be payable and paid in respect of all such ships and vessels, shall from time to time be calculated and made out according to the scale or amount of the tonnage of every ship or vessel, upon or according to which such ship or vessel shall be rated in the said port of London, to the payment of the light and other dues payable to the said corporation of Trinity House of Deptford Strond, or according to the draught of water thereof, as the said corporation of Trinity House of Deptford Strond shall in their discretion think most proper ; any thing herein contained to the contrary thereof notwithstanding.

L. And in order to prevent or settle controversies concerning the draught of water of ships and vessels from time to time on the river Thames, (not having British registers,) be it further enacted, That

whenever any difference about the draught of water of any ship or vessel shall arise between the master or other person having the command of any such ship or vessel, and any person who shall have piloted the same into the said river, or who shall be required to pilot the same therefrom, pursuant to the directions of this act, the said corporation of Trinity House of Deptford Strond, or some proper officer or person appointed by them, shall admeasure the draught of water of such ship or vessel, and shall settle and determine the same between the parties, upon application made by either of them to the said corporation within twelve hours after such ship or vessel shall have arrived at her moorings in the river, on any inward voyage, or before the cargo thereof shall be begun to be unladen, or before such ship or vessel shall quit her moorings on any outward voyage, for which admeasurement the officer or person making the same shall be paid one guinea if the ship or vessel shall be below the entrance to the London Docks at Wapping, and half a guinea if above the said entrance to the London Docks, by the person against whom the said officer or person so appointed by the corporation of the Trinity House shall decide.

vessels on the Thames shall be settled.

LI. And whereas it may be expedient from time to time to relieve such ships and vessels not having British registers as may come to the port of London with fish, corn or other provisions, in manner herein-after directed; be it therefore enacted, that it shall be lawful for the said corporation of Trinity House of Deptford Strond, and they are hereby authorized and empowered from time to time, at their discretion, to make all such regulations in relation to the piloting of ships not having British registers, bringing fish, corn or other provisions into the port of London, and which are or ought to be piloted by pilots licensed by the said corporation of Trinity House, for the ease and relief of such ships and vessels in respect of the rates or amount of pilotage hereby made payable or demandable for such ships and vessels, or for the exemption of such ships or vessels from any such rates or amount, or from any rules or regulations as to the pilotage of such ships or vessels under the provisions of this act, or of any other act of parliament relating to pilotage, or under any law or usage whatsoever, as the said corporation of Trinity House of Deptford Strond shall from time to time deem just, proper and expedient, in relation to such ships and vessels respectively; any thing herein contained to the contrary thereof notwithstanding.

Corporation of Trinity House to make regulations with respect to pilotage of small foreign vessels.

LII. And whereas under and by virtue of the said acts, passed in the forty-eighth and fifty-second years of the reign of his said late Majesty king George the Third, the surplus rates of pilotage imposed on ships not having British registers have been applied in creating funds for the relief of superannuated and infirm pilots belonging to the said corporation of Trinity House of Deptford Strond, and the fellowship of the Cinque Ports respectively, as in the said acts mentioned; and it is expedient that the surplus rates of pilotage imposed by this act on such ships should be carried to such funds respectively, and that the said funds should be applied as hereinafter mentioned; be it therefore enacted, that as well the fund already created for such superannuated and infirm pilots belonging to the said corporation of Trinity House of Deptford Strond as aforesaid, as also all such surplus

Funds arising from surplus rates of pilotage on ships not having British registers, to be applied for relief of indigent pilots, &c.

rates by this act, imposed or to be imposed as aforesaid, on ships not having British registers, which shall pertain to the establishment of the said corporation of Trinity House, shall be carried to a fund to be called "The Pilots' Fund," and that such last mentioned fund shall be applied by the said corporation in the manner following; (that is to say,) after defraying the expenses of carrying this act into execution, so far as concerns the said corporation of Trinity House, the said fund shall be applied by the said corporation for the better support, maintenance or relief of such indigent pilots belonging to the said corporation, as shall become incapable of discharging their duty from advanced age, or from any accident or infirmity, and of the wives, widows and children of such pilots, to be applied and distributed in such manner and under such rules and regulations as the said corporation of Trinity House shall order and provide; and that as well the fund already created for such superannuated and infirm pilots belonging to the society or fellowship of the Cinque Ports as aforesaid, as also all such surplus rates of pilotage by this act imposed or to be imposed as aforesaid on ships not having British registers, which shall pertain to the establishment of the Cinque Ports, shall be applied by the said court of Loadmanage for the better support, maintenance or relief of such indigent pilots belonging to the said society or fellowship as shall become incapable of discharging their duty from advanced age, or from any accident or infirmity, to be applied and distributed in such manner and under such rules and regulations as the said court of Loadmanage, shall order and provide; and as well all and every the pilots who shall receive any such surplus rates, as also the person or persons to whom the pilotage of ships and vessels not having British registers, and entering into or sailing from the said port of London, is by this act directed to be paid, shall and they are hereby required to pay over all such surplus rates to such receivers, and at such convenient places as shall be in that behalf respectively appointed by the said corporation of Trinity House, and by the said lord warden and court of Loadmanage respectively; of all which receipts, and of the appropriations aforesaid, the said corporation and the said lord warden and court of Loadmanage respectively, shall annually lay an account before parliament, within twenty days after the commencement of each session.

Owners or masters of ships not to be answerable for loss from want of a proper pilot, unless arising from refusal to take one, &c.

LIII. And be it further enacted, that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whatsoever, from or by reason or means of no licensed pilot being on board of any such ship or vessel, or of no duly qualified pilot being on board thereof, unless it shall be proved that the want of such licensed or of such duly qualified pilot respectively shall have arisen from any refusal to take such licensed or qualified pilot on board, or from the wilful neglect of the master of such ship or vessel in not heaving to, or using all practicable means, consistently with her safety, for the purpose of taking on board thereof any pilot who shall be ready and offer to take charge of the same.

Owners not liable for more than the value

LIV. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to make the owner of any ship or vessel liable in any such case for any loss or

damage beyond the value of such ship or vessel, and her appurtenances, and the freight due or to grow due for and during the voyage wherein such loss or damage may happen or arise.

of the ship and freight.

LV. And be it further enacted, that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons whomsoever from or by reason or means of any neglect, default, incompetency, or incapacity of any licensed pilot acting in the charge of any such ship or vessel, under or in pursuance of any of the provisions of this act, where and so long as such pilot shall be duly qualified to have the charge of such ship or vessel, or where and so long as no duly qualified pilot shall have offered to take charge thereof.

Owners or masters not to be liable for loss arising from incompetency of pilots.

LVI. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to deprive any person or persons of any remedy or remedies upon any contract of insurance, or of any other remedy whatsoever, which he or they might have had if this act had not been passed, by reason or on account of the neglect, default, incompetency, or incapacity of any pilot duly acting in the charge of any ship or vessel under or in pursuance of any of the provisions of this act, or by reason or on account of no pilot, or of no duly qualified pilot being on board of any such ship or vessel, unless it shall be proved that the want of a pilot, or of a duly qualified pilot, shall have arisen from any refusal to take a pilot or a duly qualified pilot on board, or from the wilful neglect of the master of such ship or vessel, in not heaving to or using all practicable means consistently with the safety of such ship or vessel, for the purpose of taking on board any pilot who shall be ready and offer to take charge of such ship or vessel.

This act not to deprive persons of remedies previously existing.

LVII. Provided always, and be it further enacted, that no pilot licensed or to be licensed as aforesaid, who shall have executed the bond hereinbefore directed to be executed by him, and shall be piloting or conducting, within the limits specified in his license, any ship or vessel which he shall be duly qualified to pilot, or be piloting in the absence of a duly qualified pilot, shall be liable to any action for damages at the suit of the party grieved in any greater sum than the amount which shall have been specified by way of penalty in such bond, and the pilotage payable to him in respect of the voyage on which such ship or vessel shall then be, for any loss or damage which shall happen from or by reason or means of his neglect or want of skill whilst acting in his capacity of a pilot on board such ship or vessel.

Licensed pilots who have executed bond, not liable for neglect or want of skill beyond its penalty and the pilotage.

LVIII. And be it further enacted, that every master of any ship or vessel who shall act himself as a pilot, or who shall employ or continue employed as a pilot any unlicensed person, or any licensed person acting out of the limits for which he is qualified, or beyond the extent of his qualification, after any pilot licensed and qualified to act as such, within the limits in which such ship or vessel shall then actually be, shall have offered to take charge of such ship or vessel, or have made a signal for that purpose, shall forfeit for every such offence double the amount of the sum which would have been legally demandable for the pilotage of such ship or vessel, and shall likewise forfeit for every such offence an additional penalty of five pounds for

Penalty on masters of vessels piloted by any other than a licensed pilot.

every fifty tons burthen of such ship or vessel, if the corporation of Trinity House of Deptford Strond, as to cases in which pilots licensed by or under the said corporation shall be concerned, or the said lord warden for the time being, or his lieutenant for the time being, as to cases in which the Cinque Port pilots shall be concerned, shall think it proper that the person prosecuting should be at liberty to proceed for the recovery of such additional penalty, and certify the same in writing.

Masters of certain ships may pilot same so long as not assisted by unlicensed persons.

LIX. Provided always, and be it further enacted, that for and notwithstanding any thing in this act contained, the master of any collier, or of any ship or vessel trading to Norway, or to the Cattegat or Baltic, or round the North Cape, or into the White Sea, on their inward or outward voyages, or of any constant trader inwards, from the ports between Boulogne inclusive and the Baltic (all such ships and vessels having British registers, and coming up either * either by the North Channel, but not otherwise), or of any Irish trader using the navigation of the rivers Thames and Medway, or of any ship or vessel employed in the regular coasting trade of the kingdom, or of any ship or vessel wholly laden with stone from Guernsey, Jersey, Alderney, Sark, or Man, and being the production thereof, or of any ship or vessel not exceeding the burthen of sixty tons, and having a British register, except as hereinafter provided; or of any other ship or vessel whatever, whilst the same is within the limits of the port or place to which she belongs, the same not being a port or place in relation to which particular provision hath heretofore been made by any act or acts of parliament, or by any charter or charters for the appointment of pilots, shall and may lawfully, and without being subject to any of the penalties by this act imposed, conduct or pilot his own ship or vessel when and so long as he shall conduct or pilot the same without the aid or assistance of any unlicensed pilot or other person or persons than the ordinary crew of the said ship or vessel.

His Majesty in council may authorize ships not exceeding 60 tons burthen to be conducted without pilots, as British ships of the like burthen.

LX. Provided also, that from and after the passing of this act it shall and may be lawful for his Majesty, by and with the advice of his privy council, or by any order or orders in council, to permit and authorize ships and vessels not exceeding the burthen of sixty tons, and not having a British register, to be piloted and conducted without having a duly licensed pilot on board, upon the same terms and conditions as are by this act imposed on British ships and vessels, not exceeding the like burthen.

Masters not liable to penalties for employment unlicensed persons whilst ship in distress.

LXI. Provided also, that nothing in this act contained shall extend or be construed to extend to subject the master or owner of any ship or vessel to any of the penalties of this act, for employing any person or persons whomsoever as a pilot or pilots in and for the assistance of such ship or vessel whilst the same shall be in distress, or in consequence thereof, or under any circumstances which shall have rendered it necessary for such owner or master to avail himself of the best assistance which at the time could be procured; any thing herein contained to the contrary thereof in anywise notwithstanding.

Master or mate

LXII. Provided always, and be it further enacted, that nothing in

this act contained shall extend or be construed to extend to subject to any penalty the master or mate of any ship or vessel being the owner or a part-owner of such ship or vessel, and residing at Dover, Deal, or the Isle of Thanet, for conducting or piloting such his own ship or vessel from any of the places aforesaid, up or down the rivers Thames or Medway, or into or out of any port or place within the jurisdiction of the Cinque Ports.

LXIII. Provided always, and be it further enacted, that when any ship or vessel shall have been brought into any port or ports in England by any pilot duly licensed, nothing in this act contained shall extend or be construed to extend to subject to any penalty the master or mate, or other person belonging to such ship or vessel, and having the command thereof, or if in ballast, any person or persons appointed by any owner, or master or agent of the owner thereof, for afterwards removing such ship or vessel in such port or ports for the purpose of entering into or going out of any dock, or for changing the moorings of such ship or vessel.

LXIV. And be it further enacted, that every master or other person having the command for the time being of any ship or vessel, who shall report, or be privy or consenting to any other person's reporting to any pilot taking the charge of such ship or vessel, a false account of the draught of water of such ship or vessel, shall forfeit and pay for every such offence, in addition to the payment of the full rate of pilotage to the pilot entitled thereto, double the amount of such pilotage; and any master or other person having the command for the time being of any ship or vessel, or having any interest, share, or property therein, who shall fraudulently alter any marks on the stem or stern-post thereof, denoting the draught of water, or shall be privy and consenting thereto, shall for any such offence forfeit and pay the sum of five hundred pounds.

LXV. And be it further enacted, that a particular description of the person of every pilot shall be written in or upon or indorsed on the back of his license; and every captain or master or other person having the command of a ship or vessel shall, on receiving a pilot on board, inspect his license; and if he shall have reason to think that such pilot is not the person to whom the license was granted, such captain or master or other person is hereby required forthwith to transmit a copy of such license to the corporation or other authority by which such license shall have been granted, stating the date thereof, together with such account and description of the person producing such license as may lead to the discovery of the offender.

LXVI. And be it further enacted, that no person shall take charge of any ship or vessel, or in any manner act as a pilot, or receive any compensation for acting as a pilot, until his license shall have been registered by the principal officers of the custom-house of the place at or nearest to which such pilot shall reside, (which officers are hereby required to register the same without fee or reward), nor without having his license at the time of his so acting in his personal custody, and producing the same to the master of any ship or vessel, or other person who shall be desirous of employing him as a pilot, or

being owner or part-owner, and residing at Dover, &c. may pilot his own ship up or down the Thames or Medway.

Ships brought into any port by pilots may be removed by the master, &c. for certain purposes.

Penalty for reporting to pilots a false account of a vessel's draught of water, or altering marks denoting such draught.

Description of pilot to be on his license, &c.

No pilot shall act until his license has been registered, nor without producing it.

Penalty.

to whom he shall offer his services, on pain of forfeiting a sum not exceeding thirty pounds, nor less than ten pounds, for the first offence; and for the second or any subsequent offence, a sum not exceeding fifty pounds, nor less than thirty pounds; and upon further pain, as to any person licensed as aforesaid, of forfeiting his license or being suspended from acting as a pilot, by and at the discretion of the corporation, or other authority from which such pilot's license was derived, either for the first, second, or any subsequent offence.

Licenses to be delivered up when required, and on death of a pilot his license shall be returned to the corporation or authority that granted it.

Penalty.

Pilots keeping public houses, &c. (unless authorized) or offending against the revenue laws, &c. shall forfeit their licenses or be suspended.

LXVII. And be it further enacted, that every pilot licensed or to be licensed as aforesaid, shall, at all times when thereunto required, produce or deliver and yield up his license to the corporation or other authority by which the same was granted; and that on the death of any such pilot, his executors or administrators, or one of them, or the person or persons to whose hands the license of such deceased pilot shall come, shall without wilful delay transmit such license to the corporation or other authority by which the same was granted, on pain of such pilot, executor, administrator, or other person, forfeiting for any neglect therein a sum not exceeding twenty pounds nor less than forty shillings.

LXVIII. And be it further enacted, that from and after the passing of this act, if any pilot, licensed by virtue of this act, or otherwise duly licensed, shall keep, or be concerned in keeping, either by himself or any agent or servant, or other person, or shall in any way be interested in the keeping of any public-house or tavern or place of public entertainment, or in the selling of any wine or spirituous liquors, or tobacco or tea (unless such pilot shall have kept or been concerned or interested in the same before the first day of March, one thousand eight hundred and eight, and shall be duly authorized by the corporation, or other authority under which such pilot shall act, to continue in such business or employment): or if any pilot, licensed as aforesaid, shall be convicted of any offence against any law or laws relating to the revenues of customs or excise, or shall be concerned in or shall wilfully connive at any indirect practices or frauds against the revenues of customs or excise, or shall procure, abet, connive at, or participate in any destruction, spoil, or concealment, fraud, exaction, or corrupt practice, relating to ships or vessels, or persons in distress at sea, or by shipwreck, or relating to the tackle, apparel, or furniture or the cargoes of such ships or vessels, or relating to the crew or passengers belonging thereto, or the monies, goods, or chattels of any of them, then and in every such case every pilot shall (over and above all other punishments, mulcts, and penalties for such offences), be adjudged to forfeit his license, or shall be suspended from acting as a pilot, by and at the discretion of the corporation or other authority, from which such pilot's license was derived.

Pilots suspended or adjudged to have forfeited their licenses, liable to penalty for acting.

LXIX. And be it further enacted, that if any person, suspended or adjudged to have forfeited his license as a pilot, shall, during the time of such suspension, or after such adjudication, take upon himself to conduct any ship or vessel as a pilot, such person shall be liable to all such penalties, to be recovered and applied in like

manner and form as are provided by this act, against any person who shall pilot or conduct any ship or vessel without ever having been licensed as a pilot.

LXX. And be it further enacted, that it shall be lawful for any licensed pilot within the limits of his license, and the extent of his qualification therein expressed, to supersede in the charge of any ship or vessel any person not licensed to act as a pilot, or not licensed so to act within such limits, or acting beyond the extent of his qualification; and every person assuming or continuing in the charge or conduct of any ship or vessel, without being a duly licensed pilot, or without being duly licensed to act as a pilot within the limits in which such ship or vessel shall actually be, or beyond the extent of his qualification, as expressed in his license, after any pilot, duly licensed and qualified to act in the premises, shall have offered to take charge of such ship or vessel, shall forfeit for every such offence a sum not exceeding fifty pounds nor less than twenty pounds.

LXXI. Provided always, and be it further enacted, that for and notwithstanding anything in this act contained, any person whatsoever shall and may lawfully, and without being subject to any penalty by this act imposed, assume or continue in the charge or conduct of any ship or vessel as a pilot, where and so long as a pilot duly licensed and qualified shall not have offered to take the charge of such ship or vessel, or made a signal for that purpose, or where and so long as such ship or vessel shall be in distress, or under circumstances which shall have rendered it necessary for the master of such ship or vessel to avail himself of the best assistance which at the time could be procured.

LXXII. And be it further enacted, that every pilot licensed or to be licensed as aforesaid, who shall, when not actually engaged in his capacity of pilot, refuse or decline or wilfully delay to go off to or on board of or to take charge of any ship or vessel wanting a pilot, and within the limits specified in his license, and of which he shall be qualified to take charge, upon the usual signal for a pilot being displayed from such ship or vessel, or upon being required so to do by the captain, or by any commissioned or warrant officer of or belonging to such ship or vessel (if the same shall be in his Majesty's service), or by the master, or other person having the command of such ship or vessel, or by any person or persons interested therein as principal or agent (if the same shall not be in his Majesty's service), or upon being required so to do in either of the cases aforesaid, by any officer of the corporation or society to which such pilot shall belong, or by any principal officer of his Majesty's customs (unless in any of the cases aforesaid) it shall be unsafe for such pilot to obey such signal, or comply with such requisition, or he shall be prevented from so doing by illness or other sufficient cause to be shown by him in that behalf; and every pilot licensed or to be licensed as aforesaid, who shall on any frivolous pretext quit any ship or vessel, or decline the piloting thereof, after he has been engaged to pilot the same, or after going alongside thereof, before the service shall have been performed for which he was hired, and without leave of the captain of such ship or vessel (if in his Majesty's service) or of the

Licensed pilots may supersede unlicensed ones.

Penalty on unlicensed persons acting as pilots after a proper pilot shall have offered to take charge of the ship.

When unlicensed persons, &c. may act as pilots.

Penalty on pilots who shall decline to go off to or take charge of vessels, or who shall quit the same.

master or other person having the command of such ship or vessel (if not in his Majesty's service), shall forfeit for every such offence any sum not exceeding one hundred pounds, nor less than ten pounds, and shall be liable to be dismissed from being a pilot, or suspended from acting as such, at the discretion of the corporation or other authority by whom such pilot was licensed.

Penalty on pilots for employing or requiring the employment of any boat, &c. beyond what is necessary, thereby to increase expense.

LXXIII. And be it further enacted, that in case any pilot, licensed or to be licensed as aforesaid, shall employ or make use of, or shall compel or require any person having the command or charge of any ship or vessel, to employ or make use of any boat, anchor, cable, hawser, or other matter or thing in or for the service or pretended service of such ship or vessel beyond what shall actually and *bond fide* be necessary and proper for the use thereof, with intent thereby to enhance or increase the charge or expense of pilotage or pilot assistance of such ship or vessel, whether for the gain and emolument of such pilot, or for the gain or emolument of any other person or persons whomsoever, then and in every such case the person so offending shall forfeit and pay a sum not exceeding fifty pounds, nor less than ten pounds, and shall also be liable to be deprived of his license, or suspended from acting as a pilot, at the discretion of the corporation or other authority by whom he was licensed.

Penalty for lending license, and for drunkenness, and for conducting any vessel into danger, or injuring the same, or obtaining charge thereof by misrepresentation.

LXXIV. And be it further enacted, that in case any pilot, licensed or to be licensed as aforesaid, shall lend his license to any unlicensed person to assist him in acting or claiming to act as a licensed pilot, or in case such unlicensed pilot, or any person not being a pilot, but acting under pretext or colour of being a pilot, shall by drunkenness render himself incapable of conducting any ship or vessel, or shall wilfully or negligently run any ship or vessel on shore, or lose or injure the same, or the tackle or furniture thereof, or shall wilfully and knowingly conduct, lead, decoy, or betray any ship or vessel into danger in any manner not already provided against by any statute or statutes, or shall unnecessarily or improperly cut any cable or cables of or belonging to any ship or vessel, or cause or procure the same to be cut unnecessarily and improperly; or if any such person shall by wilful misrepresentation of any circumstances upon which the safety of any ship or vessel shall appear materially to depend, for the time being, obtain or endeavour to obtain the charge and conduct of any such ship or vessel, then and in every such case the person so offending, or who shall aid in, procure, abet, or connive at the committing of any such offence or offences, shall, besides being liable to damages at the suit of the party grieved, forfeit and pay a sum not exceeding one hundred pounds nor less than twenty pounds; and if the person so offending shall be a pilot, he shall also be liable to be deprived of his license, or suspended from acting as a pilot, at the discretion of the corporation or other authority by whom his license was granted.

Penalty on pilots for not obeying the orders of dock masters.

LXXV. And whereas the dock master or dock masters appointed by divers dock companies in the port of London, under and by virtue of divers acts of Parliament, have power and authority to direct the mooring and unmooring, moving or removing of ships and other vessels, within certain distances from the entrances out of the

river Thames into the docks of such companies respectively ; be it therefore enacted, that from and after the passing of this act, if any pilot having the charge or direction of any ship or vessel within such distances from the respective entrances into the said docks respectively from the river Thames, and either intended to go into or having recently come out of the docks of the said companies respectively, shall neglect or refuse to obey such orders or directions as shall or may from time to time be given to such pilot by the said dock master or dock masters respectively, under and by virtue of and agreeably to the powers vested in him and them by any act or acts of Parliament, touching or relating to the mooring, unmooring, moving or removing of such ships or vessels so being under the charge or direction of such pilot as aforesaid, then and in every such case, every pilot so offending shall forfeit and pay a sum not exceeding fifty pounds, nor less than twenty pounds ; and every such pilot shall be liable to be dismissed from being a pilot, or suspended from acting as such, at the discretion of the corporation, or other authority by whom such pilot was licensed.

LXXXVI. And be it further enacted, That all fines, penalties, or forfeitures hereinbefore or hereinafter imposed by this act, or by any of the bye-laws, rules, orders, regulations, or ordinances hereby directed to remain in force, or hereafter to be made under the authority of this act, which shall exceed the sum of twenty pounds (the manner of levying whereof shall not by this act be otherwise expressly provided for), and likewise all fines, penalties, or forfeitures imposed as aforesaid, (the manner of levying which shall not by this act be otherwise expressly provided for), in cases where the lowest penalty recoverable not being greater than twenty pounds, and the largest penalty recoverable being greater than twenty pounds, the party prosecuting shall proceed in respect thereof for a sum greater than twenty pounds, with the written consent of the corporation of Trinity House of Deptford Strond, or of the said lord warden or his lieutenant for the time being respectively (as the case may be), shall and may be recovered with full costs of suit, by action of debt, bill, plaint, or information, in any of his Majesty's courts of record at Westminster, to be commenced within twelve calendar months next after such offence or offences shall be committed, or within such other time as is hereinafter in that behalf directed ; the venue in which said action, bill, plaint, or information, shall and may, at the option of the plaintiff or informant, be laid, and the said action, bill, plaint, or information, tried either in the county of Middlesex or the city of London, or else in such county or place wherein the offence or offences shall have been committed, and no essoin, protection, wager of law, or any more than one imparlance shall be allowed ; and in any such case or cases, it shall be lawful to sue for the largest penalty or penalties recoverable in that behalf, and the jury giving the verdict shall and may award either such largest penalty or penalties, or any other smaller sum or sums of money, not less than the sum specified as the lowest penalty recoverable in that behalf.

LXXXVII. And be it further enacted, That all fines, penalties, or forfeitures hereinbefore or hereinafter imposed by this act, or by any of the bye-laws, rules, orders, regulations, or ordinances hereby

How penalties
above 20*l.* may
be recovered.

How penalties
not exceeding
20*l.* may be
recovered.

directed to remain in force, or hereafter to be made under the authority of this act, and which shall not exceed twenty pounds, (the manner of levying whereof shall not by this act be otherwise expressly provided for), and likewise all fines, penalties, or forfeitures imposed as aforesaid (the manner of levying which shall not by this act be otherwise expressly provided for), in cases where the lowest penalty recoverable, not being greater than twenty pounds, and the largest penalty recoverable being greater than twenty pounds, the party prosecuting shall proceed in respect thereof for any sum not exceeding twenty pounds, with such written consent as aforesaid, shall and may be levied and recovered within six calendar months after the offence or offences committed, or within such other times as is hereinafter in that behalf directed, before any justice or justices of the peace for the county, city, division, or place where the offence or offences shall be committed; or if committed by any pilot, then before any justice or justices of the peace for the county, city, division, or place aforesaid, or before any justice or justices of the peace, or any magistrate or magistrates of the city, town, or port to which such pilot shall belong; or if committed by any owner or master of any ship or vessel, before any justice or justices of the peace for the county, city, division, or place where the offence or offences shall have been committed, or before any justice or justices of the peace, or any magistrate or magistrates of the county, city, town, or port at which such owner or master shall reside, or to which the ship of such owner or master shall belong: or if committed on any part of the sea from Orfordness to the mouth of the river Thames, or from Dungeness to the mouth of the river Thames, or upon the rivers Thames or Medway, then only before some justice or justices of the peace of the counties of Kent, Surrey, Essex or Middlesex, or before some magistrate or magistrates of the city of London; and all and every the justice and justices, magistrate and magistrates aforesaid, is and are hereby empowered and required, upon complaint to him or them made, to grant a warrant to bring before him or them such offender or offenders at the time or place in such warrant specified; and if on conviction of the offender or offenders respectively, on his, her, or their confession, or on the evidence of any one or more credible witness or witnesses upon oath, (which oath such justice or justices, magistrate or magistrates, is and are hereby empowered to administer), such fine, penalty or forfeiture shall not be forthwith paid, it shall and may be lawful to and for such justice or justices, magistrate or magistrates, to levy the penalty by distress, and for want of distress to commit every such offender or offenders to the common gaol or house of correction for the county, city or place where such offender or offenders shall be convicted, there to remain without bail or mainprize for any time not exceeding six calendar months, nor less than twenty-one days, unless such fine, penalty, or forfeiture, and all reasonable charges attending the recovery thereof, shall be sooner paid: provided always, that in case the said respective periods of twelve calendar months, and six calendar months, or either of them, within which fines, penalties, or forfeitures are to be sued for as aforesaid, shall in any case or cases elapse and run out before any action or prosecution hereby authorized

and directed shall have been commenced for the recovery of such fines, penalties, or forfeitures; and if it shall in manner hereinafter mentioned be made to appear, as soon after as the circumstances of the case shall reasonably admit, that the commencement of the action or prosecution has been delayed by reason of the absence of any party or parties whether offending or complaining, or by the absence of any necessary witness or witnesses, then upon such circumstances being stated by affidavit in writing, made before any judge of any of his Majesty's courts of record at Westminster, it shall thereupon be lawful for any such judge or judges to order or authorize the commencement of such action or prosecution within such further time as such judge shall think fit to limit in that behalf; and in such case, the action or actions, prosecution or prosecutions so ordered or authorized, shall and may be commenced and prosecuted within the time or respective times so limited, in like manner and with the like effect in all respects, as if such prosecutions had been commenced and prosecuted within the said respective periods of twelve months, and six months hereby limited.

LXXVIII. And be it further enacted, That in case any person against whom a warrant shall be issued by any justice or justices, magistrate or magistrates, before or after any conviction for any offence against this act, shall escape, go into, or reside, or be in any other county, riding, division, city, liberty, town, or place, not within the jurisdiction of the justice or justices, magistrate or magistrates granting such warrant, it shall be lawful for any justice of the peace of the county, riding, division, city, liberty, town, or place, into which such person shall escape, either before or after conviction, and they and every of them are hereby required upon proof made upon oath of the handwriting of any justice or justices, magistrate or magistrates granting such warrant, to endorse his or their name or names on such warrant, and the same when so indorsed shall be sufficient authority to all peace officers to execute such warrant in such other county, riding, division, city, town, or place, out of the jurisdiction of the justice or justices granting the said warrant; and any justice or justices respectively, on the offender being apprehended and brought before him or them, within their respective jurisdictions, may proceed to hear and determine the complaint, in the same manner as if it had originally arisen within his or their respective jurisdictions, or may direct the offender to be carried, and such offender shall accordingly, in that case, be carried to or before the justice or justices who granted the original warrant, to be dealt with according to law.

LXXIX. And be it further enacted, that if any person who shall be summoned as a witness upon any complaint or information before any justice or justices of the peace, magistrate or magistrates, shall refuse or neglect to appear at the time by such summons appointed, having no just cause for such neglect or refusal, it shall be lawful for such justice or justices, magistrate or magistrates, on proof of such summons having been served, and of a tender of reasonable expenses having been made to such person on his being served with such summons, to issue a warrant, under his hand and seal or their hands and seals, to bring such person before him or them; and if on

Justice of any county into which an offender may escape may endorse the original warrant, which shall authorize the peace officers to execute it.

Witnesses not appearing may be committed to the house of correction.

appearance, or on being brought before any justice or justices, magistrate or magistrates, such person shall refuse to be examined on oath concerning the premises, without having some just cause for such refusal, it shall be lawful for such justice or justices, magistrate or magistrates, by warrant under his hand and seal, or their hands and seals, to commit such person to the house of correction of the county, city, division, or place where any such person shall be apprehended, there to remain for any time not exceeding six weeks, nor less than ten days, as any such justice or justices, magistrate or magistrates, shall direct.

Persons convicted of giving false testimony, guilty of perjury.

LXXX. And be it further enacted, that every person who in any examination upon oath, under the provisions of this act, shall wilfully give false testimony, or a false account of the matter sworn to by such person, shall be liable to be prosecuted for the same by indictment, and if duly convicted of false swearing in the premises, shall be subject and liable to such punishments, disqualifications, and disabilities, as any person would be subject or liable to for wilful and corrupt perjury, in any other case by the laws and statutes of the realm.

Convictions may be drawn up in the following form.

LXXXI. And for the more easy and speedy conviction of offenders against this act, be it further enacted, that all and every justice and justices of the peace, magistrate or magistrates, before whom any person shall be convicted of any offence against this act, or against any bye-law, rule, regulation, or order hereby directed to remain in force, or hereafter, to be made under the authority hereof, shall and may cause the conviction to be drawn up according to the following form, or in words to the like effect; *videlicet*,

"Be it remembered, that on the day of in the year of our Lord *A. B.* is convicted before me [*or us*], one [*or two, as the case may be*] of his Majesty's justices of the peace for the [*here specify the offence, and the time and place when and where committed, as the case may be,*] contrary to an act passed in the sixth year of the reign of king George the Fourth, intituled, [*here insert the title of this act*], and I [*or we*] do adjudge that the said [*insert the offender's name*] hath therefore forfeited the sum of [*here insert the penalty*]. Given under my hand and seal [*or our hands and seals*] the day and year first above written."

And no certiorari, or other writ or process for the removal of any such conviction, or any proceedings thereon, into any of his Majesty's Courts of Record at Westminster, shall be allowed or granted.

Appeal may be made to the quarter sessions, who may finally determine the matter and award costs.

LXXXII. And be it further enacted, that it shall and may be lawful to and for any person or persons so convicted by any justice or justices of the peace, magistrate or magistrates before mentioned, of any offence or offences against this act, or against any bye-law, rule, order, regulation, or ordinance hereby directed to remain in force, or hereafter to be made under the authority hereof, within three calendar months next after such conviction, to appeal to the justices of the peace assembled at the general quarter sessions holden for the county, city or place where the matter of appeal shall arise, first giving ten days notice of such appeal to the person or persons appealed against, and of the matter thereof, and within fourteen days next after such notice entering into a recognizance before some justice of the peace for such county, city or place, with sufficient sureties

conditioned to try such appeal, and for abiding the determination of the court therein; and such justices so assembled shall, upon due proof of such notice having been given, and recognizance entered into, hear and determine the matter of such appeal, and may either confirm or quash and annul the said conviction, and award such costs to either party as to them shall seem just and reasonable (and the decision of the said justices therein shall be final, binding and conclusive); and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form only, or be removed by certiorari or any other writ or process whatsoever, into any of his Majesty's Courts of Record at Westminster or elsewhere; any law or statute to the contrary thereof in anywise notwithstanding.

LXXXIII. And be it further enacted, that one-third of all fines or penalties to be levied in pursuance of this act, or under any bye-law, rule, order, regulation, or ordinance hereby directed to remain in force, or hereafter to be made under the authority of this act, by whomsoever incurred, (save and except such fines or penalties, the application whereof shall by this act be otherwise expressly provided for), shall go to the person who shall inform or sue for the same, and the remainder of all such fines or penalties shall be carried to and applied to the purposes of the said fund belonging to the said Corporation of Trinity House, called "The Pilot's Fund," in case such fines or penalties shall be incurred by pilots licensed by the said corporation, or by any person or persons in relation to any matters wherein such last-mentioned pilots shall be in anywise concerned; and in case such fines or penalties shall be incurred by pilots belonging to the fellowship of the Cinque Ports, or by pilots under any other jurisdictions or authorities, or by any other person or persons in relation to any matters wherein such pilots respectively shall be in anywise concerned, then the remaining two-thirds of such last-mentioned fines or penalties shall be carried to and applied to the purposes of such fund as hath been or shall be created for the relief of such indigent pilots belonging to the said fellowship, or such other jurisdictions or authorities respectively, as shall become incapable of discharging their duty from advanced age, or from any accident or infirmity.

LXXXIV. And be it further enacted, that if any suit or action shall be brought or prosecuted against any person or persons for any thing done or to be done in pursuance of this act, in every such case the action or suit shall be commenced within six calendar months next after the fact committed, and not otherwise, and shall be laid or brought in the county, city, or place where the cause of action arises, and not elsewhere; and the defendant or defendants in such action or suit may plead the general issue not guilty, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if it shall appear so to be done, or if any such action or suit shall be brought after the time limited for bringing the same, then the jury shall find for the defendant or defendants; and if the plaintiff or plaintiffs shall become nonsuited, or suffer a discontinuance of his or their action or actions, or if a verdict shall pass against the plaintiff or plaintiffs, or if upon demurrer judgment shall be given against the plaintiff or plaintiffs, the defendant or defendants shall

Proceedings not to be quashed for want of form, or removed by certiorari.

Application of penalties. •

Limitation of actions.

general issue.

treble costs.

Regulations in any act relating to pilotage in any river, &c. and which refer to the repealed statutes, to continue in force notwithstanding such repeals.

Act not to extend to ships belonging to his Majesty.

Act not to affect the jurisdiction of the court of Loadmanage, or of the High Court of Admiralty.

Act not to prejudice right of the city of London.

Act not to affect any districts having separate jurisdictions.

Provisions of former acts for preservation of sea-marks and beacons to ex-

have treble costs, and shall have such remedy for the same as any defendant or defendants hath or have for costs of suit in other cases of law.

LXXXV. And be it further enacted, that all acts of parliament, and all clauses, provisions, powers, authorities, regulations, penalties and forfeitures contained in any act, which in any manner relate to the regulation of pilots or pilotage within any river, port or harbour, or within any local limits specified in any such act, clause or provision, and in which any reference is made to the said acts passed in the forty-eighth and fifty-second years of the reign of his said late Majesty king George the Third as aforesaid, or either of them, or in any manner apply thereto, or vary or alter any of the provisions thereof as to pilots or pilotage within any such limits, shall continue in full force notwithstanding the repeal of the said acts of the forty-eighth and fifty-second years aforesaid, and shall be deemed to refer and apply to this act, and shall be so construed as if the same were particularly referred to in this act; any thing in this act to the contrary notwithstanding.

LXXXVI. Provided always, and be it further enacted, that nothing in this act contained shall extend or be construed to extend to any ships or vessels belonging to his Majesty, his heirs and successors, as to their being compelled to take pilots on board.

LXXXVII. Provided always, and be it further enacted, that nothing herein contained shall extend to affect or impede the jurisdiction of the court of Loadmanage, as far as respects the pilots appointed under the authority of the said court: and provided also that nothing in this act contained shall extend or be construed to extend to affect or impair the jurisdiction of the High Court of Admiralty.

LXXXVIII. Provided always, and it is hereby further enacted and declared, that nothing in this act, contained shall extend or be construed to extend to prejudice or take away any right, property, authority or jurisdiction of the mayor of the city of London, or of the mayor and commonalty and citizens of the city of London, to, in and upon the river Thames, aforesaid.

LXXXIX. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to the taking away, abridging, defeating, impeaching, or interrupting of any grants, liberties, franchises, or privileges heretofore granted by any charters or acts of parliament to the pilots of the Trinity House of the town of Kingston-upon-Hull, or the Trinity House of Newcastle-upon-Tyne, or to give any authority to the Corporation of the Trinity House of Deptford Strond, within any ports or districts having separate jurisdictions in matters of pilotage, under any act of parliament or charter, or to alter or repeal any provisions contained in any act or acts of parliament relating to the pilots of any ports or districts in relation to which particular provision shall have been made in any act or acts of parliament as to the pilots or pilotage, or to the pilotage within the limits prescribed by any act or acts of parliament relating to pilotage for such ports, or to the burthen of vessels navigating to or from such ports.

XC. And be it further enacted, that all provisions, clauses, penalties, and forfeitures, contained in an act passed in the eighth year of the reign of Queen Elizabeth, or any other act or acts made and in force for the preservation of sea-marks and beacons, shall extend and

be construed to extend to all vessels duly appointed to exhibit lights therein for the preservation of ships and vessels at sea, and to all persons removing, injuring, or destroying such vessels or lights, which offences may be laid and tried in any county in England.

XCI. And be it further enacted, that every person who shall ride by, make fast to, or remove, or wilfully run down, or run foul of any vessel, appointed or placed to exhibit lights, or any buoy or beacon belonging to the said Corporation of Trinity House of Depford Strond, or belonging to or placed by any other corporation having lawful authority to place the same, shall, besides being liable to the expense of replacing or making good any damage occasioned thereby, forfeit for every such offence any sum not exceeding fifty pounds, nor less than ten pounds, to be recovered by action of debt, bill, plaint, or information in which no essoign, protection, privilege, wager of law, or more than one imparlance shall be granted or allowed; one-third of which said penalty shall go to the persons who shall inform or sue for the same, and the remainder of which said penalty shall go to the said Corporation of Trinity House of Deptford Strond, or other the corporation to which such vessel, buoy, or beacon shall belong, or by which the same shall have been placed as aforesaid, as the case may be, to be applied to the charitable purposes of the said corporations respectively.

tend to all vessels appointed to exhibit lights, &c.

Penalty for riding by, &c. such vessels, or any buoy or beacon.

Public act, s. 92.

Act may be altered or repealed this session, s. 93.

N. B.—The act is followed by two schedules, containing rates of pilotage, and by the two following forms of oath.

Schedule (B.)

OATH to be taken by the Master and Wardens of the Society of Cinque Port Pilots.

" I, *A. B.* do swear, that I will diligently and impartially examine and inquire into the capacity and skill of _____ in the art of piloting ships and vessels over the flats, and round the Long Sand Head, and up the rivers of Thames and Medway, and into Ramsgate, Dover, Sandwich, and Margate Harbours, and also upon the coasts of Flanders and Holland; and will make true and speedy return thereof to the lord warden of the Cinque Ports for the time being, or his deputy, without favour, affection, fee or reward.

" So help me GOD."

Schedule (C.)

OATH to be taken by Sub-commissioners for Pilotage.

" I, *A. B.* do swear, that I will diligently and impartially examine into the capacity and skill of _____ in the art of piloting ships and vessels into the roadsteads, port, or harbour, and upon the coasts

following ; *videlicet*, [*here describe the limits within which the person examined is intended to act as pilot*] and will make true and speedy return thereof to the Corporation of Trinity House of Deptford Strond, without favour, affection, fee, or reward, other than such fee or reward as is allowed by the bye-laws or regulations duly established in that behalf.

“ So help me GOD.”

No. XVIII.

5 & 6 Wm. 4, c. 53.

An Act to repeal an Act of the Ninth Year of his late Majesty, for regulating the carriage of Passengers in Merchant Vessels from the United Kingdom to the British Possessions on the Continent and Islands of North America ; and to make further Provision for regulating the Carriage of Passengers from the United Kingdom.

9 Geo. 4, c.
21.

Repeal of recited act, except as to penalties incurred, and to rights of action which may have accrued.

No ship to sail with more than three persons on board for every five tons of burthen.

Ships carrying passengers to have a height of five feet and a half between decks.

When only two tiers of

Whereas it is expedient to make provision respecting the carriage of passengers from the United Kingdom to distant countries, and for that purpose to repeal a certain act passed in the ninth year of the reign of his late Majesty king George the Fourth, intituled “ An Act to regulate the Carriage of Passengers in Merchant Vessels from the United Kingdom to the Continent and Islands of North America :” be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present parliament assembled, and by the authority of the same, that the said recited act shall be and the same is hereby repealed : Provided nevertheless, that all fines, forfeitures, and penalties to which any person or persons may have become liable under the said act shall and may be sued for, prosecuted, and recovered ; and that any right of action which may have accrued to any person or persons by virtue of the said act shall and may be enforced hereafter in such and the same manner in all respects as if this present act had not been made.

II. And be it further enacted, that no ship carrying passengers from any port or place in the United Kingdom, or in the Islands of Guernsey, Jersey, Alderney, Sark, or Man, on any voyage to or for any port or place out of Europe, and not being within the Mediterranean Sea, shall proceed on her voyage with more persons on board than in the proportion of three persons for every five tons of the registered burthen of such ship, the master and crew being included in and forming a part of such prescribed number ; and that no such ship having more than one deck shall carry any passengers upon any such voyage as aforesaid unless she shall be of the height of five feet and a half at the least between decks ; and that no such ship having only one deck shall carry any passengers upon any such voyage as aforesaid unless a platform shall be laid beneath such deck in such a manner as to afford a space of the height of at least five feet and a half, and that no such ship shall have more than two tiers of berths ; and that no such ship having two tiers of berths

shall carry any passengers on any such voyage as aforesaid unless there shall be an interval of six inches at the least between the deck or platform and the floor of the lower tier throughout the whole extent thereof: Provided always, that, whatever may be the tonnage of the ship, no greater number of persons as passengers shall be taken on board than shall be after the rate of one such person for every ten superficial feet of the lower deck or platform unoccupied by goods or stores, not being the personal luggage of such persons, if such ship shall not have to pass the line on her voyage, or after the rate of one such person for every fifteen such clear superficial feet if such ship shall have to pass the line.

berths, the floor of the lower tier to be six inches above the deck.

III. And be it further enacted, that no ship carrying passengers on any such voyage as aforesaid shall be cleared out for such voyage from any port in the United Kingdom, or in the said Islands of Guernsey, Jersey, Alderney, Sark, or Man, unless and until there shall be actually laden and on board such ship good and wholesome provisions for the use and consumption of the said passengers, over and above the victualling of the crew, to the amount or in the proportion following; that is to say, a supply of pure water to the amount of five gallons to every week of the computed voyage for every passenger on board such ship, such water being carried in tanks or sweet casks, and a supply of bread, biscuit, oatmeal, or bread stuffs to the amount of seven pounds weight, to every week of the computed voyage for every such passenger: Provided always, that to the extent of one-third of such supply, and no more, seven pounds weight of potatoes may be deemed and computed to be equivalent to one pound weight of bread, biscuit, oatmeal, or bread stuffs in the supply of any ship bound to some place in North America: Provided also, that when any ship shall be destined to call at a port or place in the course of her voyage for the purpose of filling up her water, a supply of water at the rate before mentioned for every week of the computed voyage to such port or place of calling shall be deemed to be a compliance with the provisions of this act.

Regulating the quantity of water and provisions to be carried by every vessel with passengers on board.

IV. And be it further enacted, that the number of weeks deemed to be necessary for the voyage of any such ship, according to her destination, shall be determined by the following rule of computation; (that is to say,)

Computed number of weeks requisite for voyage of vessel.

For a voyage to North America, ten weeks:

For a voyage to South America on the Atlantic ocean, or to the west coast of Africa, twelve weeks:

For a voyage to the Cape of Good Hope, fifteen weeks:

For a voyage to the Mauritius, eighteen weeks:

For any other voyage, twenty-four weeks.

V. And be it further enacted, that, before any such ship shall be cleared out for the voyage, the officers of the customs shall survey, or cause to be surveyed by some competent person, the provisions and water herein-before required for the consumption of the passengers, and shall ascertain that the same are in a sweet and good condition, and shall also ascertain that, over and above the same, there is on board an ample supply of water and stores for the vic-

Officers of customs to examine provisions and water before departure of vessel.

tualling of the crew of the ship; and such officers shall also ascertain that the directions herein-before contained in respect of the situations of berths have been complied with.

A table to be made of the prices of provisions to be sold on board.

VI. And be it further enacted, that the master of every such ship shall cause a table to be drawn up of the respective prices at which any provisions or stores that may be sold by any person on board to any of the passengers during the voyage are to be supplied; and that a copy of the same, printed or written in a fair and legible manner, shall be affixed in some convenient and conspicuous place on board the said ship for the perusal of all parties, and that the same shall be maintained for continual reference as well during the period in which passengers shall be engaged as during the whole of the voyage; and that no higher prices than are stated in such table shall in any case be charged for such provisions or stores as may be so supplied during the voyage: Provided nevertheless, that nothing herein contained shall be construed as requiring the master of any ship to provide provisions or stores for the purpose of sale to any passengers who may have contracted to victual themselves during the voyage.

Seaworthiness of the ship may be ascertained by survey.

VII. And be it further enacted, that if doubts shall arise whether any ship about to proceed with passengers as aforesaid is sea-worthy, so as to be fit for her intended voyage, and such doubts shall not be removed to the satisfaction of the collector and comptroller of the customs at the port from which such vessel is to be cleared out, it shall be lawful for such collector and comptroller at any time to cause such ship to be surveyed by two competent persons; and if it shall be reported by those persons that such ship is not in their opinion sea-worthy with reference to such voyage, such ship shall not be cleared out unless the contents of such report be disproved to the satisfaction of the commissioners of the customs, or until such ship shall have been rendered sea-worthy.

Copies or abstracts of this act to be kept on board for the perusal of passengers.

VIII. And be it further enacted, that two copies of this act, or abstracts of the same, made, provided, and issued by the authority of the commissioners of the customs, and authenticated by the signature of the collector or comptroller of the customs at the port of clearance of the ship, shall be delivered to the master, on demand, by such collector or comptroller at the time of clearance, and shall be kept on board every ship proceeding with passengers as aforesaid, and that one of such copies or abstracts shall, upon request made at seasonable times to the master of the ship, be produced to any passenger for his perusal.

With every ship carrying 100 passengers a medical practitioner to sail; in every ship carrying a smaller number, medicines of sufficient amount and kind to be carried.

IX. And be it further enacted, that no ship carrying passengers in any such voyage as aforesaid to any such port or place as aforesaid, except any port or place in North America, if the number of such passengers shall amount to or exceed one hundred, shall clear out for such voyage from any port in the United Kingdom, or in the said Islands of Guernsey, Jersey, Alderney, Sark, or Man, unless there shall be rated upon the ship's company, and shall be actually serving on board such ship, some person duly authorized by law to practise in this kingdom as a physician or surgeon, or apothecary, and that no such ship shall actually put to sea or proceed on such voyage unless such medical practitioner shall be therein, and shall

bonâ fide proceed on such voyage, taking with him a medicine chest, and a proper supply of medicines, instruments, and other things suitable to the intended voyage; and no ship carrying passengers under the provisions of this act shall clear out for any voyage from any such port as aforesaid unless and until there shall be actually laden and on board such ship medicines and other things necessary for the medical treatment of the passengers on board during such intended voyage, and available for that purpose, nor unless such medicines and other things shall be adequate in amount and kind to the probable exigencies of any such voyage; and, together with such medicines and other things, shall also be put on board every such ship previously to her clearing out for any such voyage as aforesaid a certificate under the hands of any two or more such medical practitioners as aforesaid, to the effect that such medicines and other things have been inspected by them, and are, in their judgment, adequate to meet any such probable exigencies as aforesaid.

X. And be it further enacted, that no ship carrying passengers to any place as aforesaid shall be cleared out if there shall be laden on board such ship by way of stores, over and above the stores proper for the crew of such ship, any quantity of spirits or strong waters beyond one-tenth part of such quantity as would, except for this restriction, be allowed by the officers of the customs upon the victualling bill of such ship for the outward voyage only, according to the number of persons going the voyage.

Ships carrying passengers as aforesaid prohibited from exporting spirits, &c. as merchandize.

XI. And be it further enacted, that the master of every ship carrying passengers on any such voyage as aforesaid shall, before clearing out his said ship for such voyage from any port or place in the United Kingdom, or in the said islands of Guernsey, Jersey, Alderney, Sark, or Man, deliver to the collector or other principal officer of his Majesty's customs at such port or place, a list in writing, together with a duplicate of the same, specifying, as accurately as may be, the names, ages, and professions or occupations of all and every the passengers on board such ship, with the name of the port or place at which he the said master hath contracted to land each of the said passengers; and such collector or other chief officer of customs shall thereupon deliver to the said master a counterpart of such list signed by him the said collector or other chief officer as aforesaid; and the said master shall exhibit the said counterpart of his said list to the collector or other chief officer of his Majesty's customs at any port or place in his Majesty's possessions, or to his Majesty's consul at any foreign port, at which the said passengers, or any of them, shall be landed, and shall deposit the same with such collector or chief officer of customs, or such consul, as the case may be, at his final port of discharge in the said possessions.

Master to deliver list of passengers to collector of customs who shall give to the master a counterpart, to be exhibited to the chief officer of customs at the port of landing.

XII. And for the prevention of frauds which might be practised upon persons emigrating from the United Kingdom, be it further enacted, that the master of any ship carrying any passengers as aforesaid shall not, without his or her previous consent, land or put on shore, or cause to be landed or put on shore, any passenger at any port or place other than the port or place at which he may have contracted to land or put such passenger on shore.

Penalty on master improperly landing passengers at any place not contracted for.

How children
are to be com-
puted in the
enumeration of
passengers.

XIII. Provided always, and be it further enacted and declared, that for the purpose and within the meaning of this act two children, each being under the age of fourteen years, but above the age of seven years, or three children, each being under the age of seven years, shall in all cases be computed as one person only ; and that children under the age of twelve months shall not be included in the computation of the number of persons.

Fines in case
of detention.

XIV. And be it further enacted, that if any ship shall not actually put to sea and proceed upon any such intended voyage as aforesaid on the day for that purpose appointed in and by any contract made by the owner, master, or charterer of such ship, or by their agent, with any passenger who shall on that day be on board the same, or ready to proceed on such intended voyage, then and in every such case the master of such ship shall pay to each and every such passenger as shall have contracted to victual himself a fine, to be computed at and after the rate of one shilling in respect of each day during which he or she shall be so detained previously to the actual clearing out and final departure of such ship on such voyage, and that the same may be recovered daily ; and the master of such ship shall victual each and every such passenger as shall have contracted to be victualled by the ship owner on and from the day which shall be so appointed : provided always, that no such fine as aforesaid shall be incurred or be payable in respect of any detention of any such vessel which shall be so detained by stress of weather or other unavoidable cause.

Passengers to
be maintained
for forty-eight
hours after
their arrival.

XV. And be it further enacted, that at the close of any such voyage as aforesaid every person arriving as a passenger at any port or place shall, during the space of forty-eight hours next after such arrival, be entitled to continue on board such ship, and to be provided for and maintained on board the same in such and the same manner as during such voyage, unless in any case it shall have been expressly stipulated and agreed between any such passenger and the master of such ship that such passenger shall not be entitled to such provision or maintenance during the said period of forty-eight hours, or unless in the ulterior prosecution of her voyage any such ship shall quit any such port or place within the said period of forty-eight hours.

Penalties in
case of in-
fringement of
the preceding
enactments.

XVI. And be it further enacted, that if any ship carrying passengers on any voyage from any port or place in the United Kingdom, or in the islands of Guernsey, Jersey, Alderney, Sark, or Man, on any voyage to or for any port or place out of Europe, and not being in the Mediterranean Sea, shall carry any number of passengers exceeding by more than one person in fifty the proportion authorized and allowed by this present act ; or if such ship shall not be of the height between decks hereinbefore required ; or if such a platform as hereinbefore directed shall not be laid and continued throughout the whole duration of any such voyage in such manner as is hereinbefore required ; or if there shall be more than two tiers of berths ; or if there shall not be throughout the whole duration of any such voyage such an interval as is hereinbefore prescribed between the deck and the floor of the lower tier of berths ; or if any such ship shall clear out and put to sea not having on board such water and provisions as aforesaid, for the use and consumption of the said pas-

sengers, of the kind and to the amount and in the proportion hereinbefore required; or if a table of the prices of provisions or stores shall not be exhibited as hereinbefore required; or if any higher prices than are named in such table shall be charged; or if there shall not be on board any such vessel such medical practitioner as aforesaid, or such medicines and other things necessary to the medical treatment of the passengers, as is hereinbefore required; or if any such ship shall be cleared out before such lists of passengers as hereinbefore mentioned shall have been delivered in manner and form aforesaid to such officer as aforesaid; or if any such list shall be wilfully false; or if the copy or abstract of this act be not produced as hereinbefore required; or if any passenger shall not be allowed to continue on board such ship in manner hereinbefore provided; or if any passenger shall, without his or her previous consent, be put on shore at any place other than the place at which the master had contracted to land such passenger, the master of any such ship shall for and in respect of each and every such offence be liable, on such summary conviction as hereinafter mentioned, to the payment of a fine of not less than five pounds nor more than twenty pounds sterling British money.

XVII. Provided nevertheless, and be it further enacted, that nothing herein contained shall take away or abridge any right of suit or action which may accrue to any passenger in any such ship, or to any other person, in respect of the breach or non-performance of any contract made or entered into between or on the behalf of any such passenger or other person, and the master, owner or owners of any such ship.

The right of action of passengers not to be taken away or abridged.

XVIII. And be it further enacted, that all indictments or informations against any person or persons for or in respect of any offences by them committed or alleged to have been committed under this act, and that all proceedings for the recovery of any fines, penalties, or forfeitures incurred or alleged to have been incurred by any person or persons under this act, shall be preferred and prosecuted by any person or persons whomsoever, and shall be proceeded with and determined before such and the same courts, magistrates, and justices of the peace, and in such and the same manner, and by such and the same persons, and with, under, and subject to all such and the same rules, provisoes, conditions, and restrictions, as in the case of any indictments or informations preferred or proceedings taken for or in respect of any offence committed, or for the recovery of any fines, penalties, or forfeitures incurred, under any act of Parliament now in force for the prevention of smuggling, or relating to the customs or to trade of navigation: provided always, that in order to the preferring, prosecuting, proceeding with, or determining any such indictments or informations under this present act, the direction or consent of the commissioners of customs shall not be necessary or required, anything in such acts of Parliament as aforesaid to the contrary in anywise notwithstanding.

Prosecution and recovery of penalties.

XIX. And for the more effectually securing the observance of the aforesaid rules, and the payment of the penalties aforesaid; be it further enacted, that before any ship carrying passengers shall clear out for any such voyage as aforesaid from any port or place in the

Masters of vessels to enter into bond (without stamps for the

due performance of the regulations prescribed by this act.

Limitation of prosecutions.

Exception of particular kinds of ships.

Bahamas, &c. to be deemed in South America. Act may be altered in this session.

United Kingdom, or in the said islands of Guernsey, Jersey, Alderney, Sark, or Man, to or for any port or place out of Europe, and not being in the Mediterranean Sea, the master of the said ship shall enter into a bond to his Majesty, his heirs, and successors, with one good and sufficient surety, to be approved by the collector or other chief officer of customs at such port, in the sum of one thousand pounds, the condition of which bond shall be that the said ship is sea-worthy, and that all and every the rules and regulations made and prescribed by this act for the carriage of passengers shall be well and truly performed before and during such intended voyage, and that all penalties, fines, and forfeitures which the master of such ship may be sentenced or adjudged to pay for or in respect of the breach or non-performance, before or during such voyage, of any such rules and regulations, shall be well and truly paid : provided always, that such bond shall be without stamps, and that no such bond shall be put in suit, and that no prosecution, suit, action, or information shall be brought under or by virtue of this act, or upon or by reason of the breach of any of the provisions thereof, in any of his Majesty's possessions abroad after the expiration of twelve calendar months next succeeding the commencement of any such voyage as aforesaid, nor in the United Kingdom or any of the islands before mentioned after the expiration of twelve calendar months next after the return of the master to the port or place from which he sailed on such voyage.

XX. And be it further enacted, that nothing in this act contained shall extend or be construed to extend to ships carrying passengers in cases in which the number of persons, computed in manner hereinbefore provided, shall not exceed one person for every five tons of the registered burthen of such ship ; nor shall anything in this act contained extend to any ship in the service of the lords commissioners of his Majesty's Admiralty, or in the service of his Majesty's postmaster-general, or in the service of the East India Company.

XXI. And be it further enacted and declared, that the Bahama Islands, and all places in America southward of the same, shall be deemed to be in South America for the purposes of this act.

XXII. And be it further enacted, that this act may be amended, altered, or repealed by any act or acts to be passed in this session of Parliament.

No. XIX.

4 Geo. 4, c. 88.

An Act for regulating Vessels carrying Passengers between Great Britain and Ireland.

WHEREAS it is expedient that such regulations should be made respecting vessels carrying passengers between Great Britain and Ireland as may tend to the security and convenience of such passengers ; be it therefore enacted by the king's most excellent Majesty, by and with advice and consent of the lords spiritual and

temporal, and commons, in this present Parliament assembled, and by the authority of the same, That from and after the first day of September one thousand eight hundred and twenty-three, it shall not be lawful for the master or commander, or person having the charge or command of any vessel employed in the conveyance of passengers between Great Britain and Ireland, being of any burthen less than two hundred tons, to have or take on board, or to carry or convey any greater number of persons than twenty as passengers, from any port in Great Britain to any port in Ireland, or from any port in Ireland to any port in Great Britain, unless a license for the conveyance of passengers shall have been previously granted to the owner or owners, or master or commander of such ship or vessel, under the hand of the collector, comptroller, or other chief officer of the customs, at the port from which such vessel shall sail from Great Britain to Ireland, and from Ireland to Great Britain respectively; and it shall be lawful for every such collector, comptroller, or other chief officer of the customs, to grant and sign such license without fee or reward, in such form, and under such regulations as shall be directed by the commissioners of customs: provided always, that no such license shall be granted by such collector, comptroller, or other chief officer, except upon such certificate as shall be required by the commissioners of the customs, that such vessel is sea-worthy and properly found in all respects; and every such license shall remain in force for the space of one year from the date thereof, and no longer.

II. And be it further enacted, That it shall not be lawful for any master or other person having or taking the charge or command of any ship or vessel so licensed for the conveyance of passengers, which shall clear out from any port or place in the United Kingdom of Great Britain and Ireland, from and after the first day of September one thousand eight hundred and twenty-three, to have on board at or after being cleared out at any one time, or to convey, carry, or transport from any port or place in Great Britain or Ireland respectively, in any such ship or vessel, a greater number of persons (exclusive of the ordinary crew of such ship or vessel), than in the proportion of five adult persons, or of ten children under fourteen years of age, or of fifteen children under seven years of age, for every four tons of the burthen of such ship or vessel; and every such ship or vessel shall be deemed and taken to be of such tonnage or burthen as is or may be described and set forth in the respective certificate of the registry of each and every such ship or vessel, granted in pursuance of the several acts in force in Great Britain and Ireland respectively, relating to such certificates; and if any such ship or vessel shall be partly laden with goods, wares, or merchandize, or horses or carriages, then it shall not be lawful for the master or other person having the charge or command of such ship or vessel, to receive or take on board a greater number of persons (exclusive of the ordinary crew) than in the proportion of five adult persons, or of ten children under fourteen years of age, or of fifteen children under seven years of age, for every four tons of that part of such ship or vessel which shall remain unladen; and such goods, wares, or merchandize, with which such ship or vessel may be partly laden shall, at the sight and under the direction of the collector or comptroller

No captain of any vessel under 200 tons shall take more than twenty passengers, unless licensed by collector of customs at the port.

Proportion of passengers, five adult persons (or 10 children under 14, or 15 under seven years) to four tons, including the crew.

Tonnage according to certificate of registry.

If ship partly laden with goods, &c. the tonnage for passengers to be exclusive of the part laden.

or other officer of the customs, at the port or place where such goods, wares, or merchandize shall be taken on board, be stowed and disposed of in such a manner as to leave good, sufficient, and wholesome accommodation for the proportion of persons hereby allowed in such case to be received on board.

Penalty on master or owners taking passengers without license, 50*l*.

On taking more passengers than allowed 5*l*. for each person.

Ship having more than 20 passengers without license, may be detained till penalty paid.

Merchant vessels, &c. shall not carry more than 10 persons if of or under 100 tons, or 20 if not exceeding 200 tons.

Penalty 5*l*. for every person beyond the proportion.

Abstract of this act, &c. shall be hung up at at custom-house, and on

III. And be it further enacted, That if any master or any person having the charge or command of any such ship or vessel shall take on board any passenger or passengers, or if the owner or owners of any such ship or vessel shall engage to take on board any passenger or passengers beyond the number of twenty as aforesaid, without such license being previously obtained by such master, owner, or other person as by this act is required, every such master, or other person, or owner or owners, shall for every offence forfeit the sum of fifty pounds; and if any master or other person having or taking the charge or command of any such ship or vessel, shall take on board, or if such master or other person, or the owner or owners of any such ship or vessel, shall engage to take on board a greater number of persons than in the proportion allowed by this act, such master or other person as aforesaid shall forfeit and pay the sum of five pounds for each and every or any such person, exceeding in number the proportion herein-before limited; and every such ship or vessel so having on board, or conveying or carrying any greater number than twenty persons without such license as aforesaid first had and obtained, shall and may be seized and detained by the collector, comptroller, surveyor, or officer of the customs, until such penalty of fifty pounds shall be satisfied and paid.

IV. And be it further enacted, That from and after the first day of September one thousand eight hundred and twenty-three, it shall not in any case be lawful for any master or other person taking or having the charge or command of any trading or coasting ship or vessel, not being wholly employed in the conveyance of passengers, and not licensed to carry any passengers pursuant to this act, whether such ship or vessel shall be laden in part or in the whole with goods and merchandize, not being the baggage of or belonging to any passengers in such ship or vessel, or shall be employed in the carriage or conveyance of cattle or pigs, or shall be in ballast, and which shall sail from any port or place in Great Britain to any port or place in Ireland, or from any port or place in Ireland to any port or place in Great Britain, to have or take on board a greater number of persons than ten (exclusive of the ordinary crew of such ship or vessel), if such ship or vessel shall be of the burthen of one hundred tons or under, nor a greater number of persons than twenty (exclusive of the ordinary crew), if such ship or vessel shall be of a burthen greater than one hundred tons, and not exceeding the burthen of two hundred tons; and if more persons shall be found or taken on board any such ship or vessel than in the proportion herein allowed, every such master or other person as aforesaid shall forfeit and pay the sum of five pounds for every person so taken on board beyond such proportion.

V. And be it further enacted, That an abstract of this act shall be prepared and printed by and under the direction of the commissioners of his Majesty's customs, and a printed copy of such abstract shall be hung up in the custom-house of every port of the United

Kingdom, and a printed copy of such abstract, and also a copy of the license granted to the captain or owners of such ship or vessel, and a notice or statement of the number of persons allowed to be carried and conveyed in such vessel, shall be hung up and affixed in some conspicuous place on the deck and in the cabin of every ship or vessel carrying passengers under the regulations of this act; and the master or other person having or taking the charge or command of such ship or vessel shall cause the said copies to be kept and renewed, so that the same may be at all times accessible to every person on board such ship or vessel, upon pain that every such master or other person having or taking the charge or command of every such ship or vessel, in which such abstract, license, and notice, or any of them, shall not be hung up or affixed, and shall not be renewed and remain as aforesaid, shall for every such offence forfeit the sum of ten pounds.

board every vessel.

Penalty 10l.

VI. Provided always, and be it enacted, That nothing in this act contained shall extend or be deemed or construed to extend to ships or vessels in the service of his Majesty, or of his Majesty's post-master general, or of the commissioners of customs and excise, or of the East India Company; nor to any ship or vessel of the burthen of two hundred tons or upwards, nor to any ship or vessel employed in carrying troops.

Not to extend to vessels in the service of government, &c.

VII. And be it further enacted, That all penalties and forfeitures for any offence against this act shall and may be recovered at any time within three calendar months after the commission of such offence, in a summary way, by the order and adjudication of any one justice of the peace for the county or place in which the port shall be situate, from which any such ship or vessel shall depart, or at which any such ship or vessel shall arrive, on complaint to such justice for that purpose exhibited; and such penalty shall be levied, as well as the costs of such proceedings, on non-payment, by distress and sale of the goods and chattels of the offender or offenders, or person or persons liable to pay the same, by warrant under the hand and seal of such justice; and such justice is hereby authorized and required to summon before him any witness or witnesses, and to examine such witness or witnesses upon oath, of and concerning such offences, and to hear and determine the same; and the overplus (if any) of the money so levied or recovered, after discharging the penalty or forfeiture for which such warrant shall be issued, and the costs and expenses of recovering and levying the same, shall be returned upon demand to the owner or owners of the goods or chattels so seized or distrained; and in case such penalty or forfeiture shall not be forthwith paid upon conviction, then it shall be lawful for such justice to order the offender or offenders so convicted to be detained and kept in safe custody, until return can be conveniently made to such warrant of distress, unless the offender or offenders shall give sufficient security, to the satisfaction of such justice, for his or their appearance before such justice on such day or days as shall be appointed for the return of such warrant of distress, such day or days not being more than seven days from the time of taking any such security, and which security the said justice is hereby empowered to take by way of recognizance or otherwise;

Penalties may be recovered before one justice of the peace.

Half to the
prosecutor, and
half to the
king.

Persons ag-
grieved may
appeal to quar-
ter sessions.

Proceedings
not to be
quashed for
want of form.

but if, upon the return of such warrant, it shall appear that no sufficient distress can be had thereupon, then it shall be lawful for such justice, or any other justice of the peace for such county or place as aforesaid, and he is hereby authorized and required, by warrant under his hand and seal, to cause such offender or offenders to be committed to the gaol of such county or place, there to remain, without bail or mainprize, for any term not exceeding two calendar months, unless such penalty or forfeiture, and all reasonable charges shall be sooner paid and satisfied; and one moiety of every such penalty or forfeiture, when so levied, shall be paid to the person or persons who shall sue or prosecute for the same, for his or her own use and benefit, and the other moiety thereof to the use of his Majesty, his heirs, and successors.

VIII. Provided always, and be it enacted, that if any person shall think himself or herself aggrieved by any conviction in pursuance of this act, it shall be lawful for such person to appeal to the justices of the peace at the next general quarter session of the peace to be holden for the county or place, such appellant (if there be sufficient time after the cause of such complaint shall have arisen), first giving or causing to be given ten days notice at least in writing of his or her intention of bringing such appeal, and of the matter thereof, to the justice whose conviction shall be so appealed against, and within seven days next after such notice entering into a recognizance before the said justice or some other justice of the peace for the county or place, with two sufficient sureties conditioned to try such appeal, and to abide the order of such justices at sessions thereon, and to pay such costs as shall be awarded by the justices at such quarter session; and for want of sufficient time for giving such notice previous to the quarter sessions next after the cause of such complaint shall have happened, then such appeal, after such notice and under such recognizance, may be made at the second general quarter sessions of the peace to be holden for such county or place; and the justices at such first or second sessions, upon due proof of such notice having been given as aforesaid, and of the entering into such recognizance, shall hear and finally determine the cause and matter of such appeal in a summary way, and shall award such costs to the parties appealing or appealed against, as they the said justices shall think proper, and the determination of such justices at such quarter sessions shall be final, binding, and conclusive to all intents and purposes; and the said justices at such sessions may also, by their warrant or order, cause such costs so awarded by distress and sale to be levied of the goods and chattels of the person or persons who shall refuse or neglect to pay the same; and for want of sufficient distress may commit such person or persons to the common gaol or house of correction for the said county, there to remain for any time not exceeding two calendar months, or until payment of such costs.

IX. And be it further enacted, that no proceedings against, nor any conviction of any offender or offenders against this act, or by or before any justice of the peace, shall be quashed for want of form, nor be removed or removable by certiorari, or any other writ of process whatsoever, into any of his Majesty's Courts of Record at Dublin; and where any distress shall be made for any sum or sums

of money to be levied by virtue of this act, the distress itself shall not be deemed unlawful, nor the party or parties making the same be deemed a trespasser or trespassers, on account of any defect or want of form in the summons, conviction, warrant of distress or other proceedings relating thereto; nor shall the party or parties distraining be deemed a trespasser or trespassers *ab initio*, on account of any irregularity which shall be afterwards committed by the party or parties distraining, but the person or persons aggrieved by such irregularity shall and may recover full satisfaction for the special damage (if any) in an action on the case; but no plaintiff or plaintiffs shall recover in any action for such irregularity as aforesaid, if tender of sufficient amends shall have been made by or on behalf of the party distraining before such action commenced.

X. And be it further enacted, that any action or suit which shall be brought or commenced against any person or persons for any thing done in pursuance and by the authority of this act, shall be commenced within three calendar months next after the fact committed, and not afterwards, and shall be brought in the county, city, or place where the cause of action shall arise, and not elsewhere; and that the defendant or defendants in such action or suit to be brought may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereupon, and that the same was done in pursuance and by the authority of this act; and if it shall appear to be so done, or if any such action or suit shall be brought after the time before limited for bringing the same, or shall be brought in any county, city, or place other than as aforesaid, then and in every such case the jury shall find for the defendant or defendants; and upon such verdict, or if the plaintiff or plaintiffs shall be nonsuited, or shall discontinue his, her, or their action, or if a verdict shall pass against the plaintiff, or if upon demurrer judgment shall be given against such plaintiff or plaintiffs, the defendant or defendants shall and may recover double costs, and have the like remedy for the same as any defendant or defendants hath or have for costs of suit in other cases by law.

Limitation of actions.

General issue.

Double costs.

No. XX.

53 Geo. 3, c. 159.

An Act to limit the Responsibility of Ship Owners, in certain Cases.

WHEREAS it is of the utmost consequence and importance to promote the increase of the number of ships and vessels belonging to the United Kingdom, registered according to law, and to prevent any discouragement to merchants and others from being interested therein: and whereas it is expedient to amend an act made in the seventh year of the reign of his late Majesty king George the Second, intituled, "An Act to settle how far Owners of Ships shall be answerable for the Acts of the Masters or Mariners;" and also another act, made in the twenty-sixth year of the reign of his pre-

7 Geo. 2, c. 15.

26 Geo. 3, c.
86.

Owners of ships shall not be liable to make good any damage occasioned without their fault, further than the value of their vessels.

Value of the carriage of goods, &c. to be considered as freight.

Providing for separate losses.

Act not to take away responsibility of master or mariners of such ships.

sent Majesty, intituled, " An Act to explain and amend an Act made in the seventh year of his late Majesty's reign, intituled, ' An Act to settle how far Owners of Ships shall be answerable for the Acts of Masters or Mariners, and for giving a further Relief to the Owners of Ships;' and that other provisions should be made in respect thereof; be it therefore enacted, by the king's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that no person or persons who is, are, or shall be owner or owners, or part-owner or owners of any ship or vessel, shall be subject or liable to answer for or make good any loss or damage arising or taking place by reason of any act, neglect, matter or thing done, omitted or occasioned, without the fault or privity of such owner or owners, which may happen to any goods, wares, merchandize, or other things laden or put on board the same ship or vessel, after the first day of September, one thousand eight hundred and thirteen, or which after the said first day of September, one thousand eight hundred and thirteen, may happen to any other ship or vessel, or to any goods, wares, merchandize, or other things, being in or on board of any other ship or vessel, further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution or contracted for at the time of the happening of such loss or damage.

II. And be it further enacted, that the value of the carriage of any goods, wares, or merchandize, belonging to the owner or any of the owners of such ship or vessel, and also the hire due or to grow due under or by virtue of any contract, whether made by or on behalf of his Majesty, or by or on the behalf of any other person or persons, or any body politic or corporate whatsoever, except only such hire as in the case of a ship or vessel hired for time, may not begin to be earned until the expiration of six calendar months after the happening of such loss or damage, shall be deemed and taken to be, and shall be considered as freight, within the intent and meaning and for the purposes of this act, and also of the said acts of Parliament made in the seventh year of the reign of his late Majesty king George the Second, and in the twenty-sixth year of the reign of his present Majesty.

III. And be it further enacted, that in case any such loss or damage shall arise or happen, by more than one separate and distinct accident, act, neglect, or default, or on more than one occasion in the course or progress of a voyage, or after the end of any voyage, and before the commencement of another voyage, each and every such loss or damage shall be paid, compensated and satisfied according to the provisions of this act, in such and the same way, and to the same extent, as if no other loss or damage had happened or arisen during the same voyage, or after the end of any voyage, and before the commencement of another voyage.

IV. Provided always, and be it further enacted, that nothing herein contained shall lessen or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part-owner of his ship or vessel.

V. Provided also, and be it further enacted, that nothing herein contained shall extend, or be construed to extend, to the owner or owners of any lighter, barge, boat, or vessel, of any burthen or description whatsoever, used solely in rivers or inland navigation, or any ship or vessel not duly registered according to law.

Act not to extend to owners of lighters, &c.

VI. Provided also, and be it further enacted, that nothing in this act contained, shall extend to prevent any action or suit being brought or instituted, or proceeded in, in any court of competent jurisdiction, by any person or persons who shall have suffered any loss or damage within the intent and meaning of this act, against any owner or part-owner of any ship or vessel, notwithstanding any other person or persons may have suffered any loss or damage by the same accident, act, neglect or default, or on the same occasion; but that all such actions and suits shall and may be brought or instituted, and proceeded in, in such manner as the same might have been brought or instituted, or been proceeded in, if this act had not been made; subject nevertheless to such order as any court may think fit to make, to restrain proceedings in such action or suit, on special circumstances, as justice and equity shall require.

Actions may be brought for damage by persons suffering loss though others have sustained loss by the same accident.

VII. And be it further enacted, that if several persons shall suffer any loss or damage in or to their goods, wares, merchandizes, ships, or otherwise, by any means for which the responsibility of any owner or owners is limited by this act as aforesaid, and the value of the ship or vessel, with all her appurtenances, and the amount of the freight estimated as herein is mentioned, shall not be sufficient to make full compensation to all and every the person and persons suffering such loss and damages, it shall and may be lawful to and for the person or persons liable to make satisfaction for such loss or damage, or any one or more of them, on behalf of himself, herself, or themselves, and the other owner or owners of the same ship or vessel, to exhibit a bill in any court of equity having competent jurisdiction, against all the persons who shall have brought any such action or actions, suit or suits as aforesaid, and all other persons who shall claim to be entitled to any recompence for any loss or damage arising or happening by the same separate and distinct accident, act, neglect, or default, or on the same occasion to ascertain the amount of the value of the ship or vessel, appurtenances and freight, and for payment or distribution thereof rateably amongst the several persons claiming recompence as aforesaid, in proportion to the amount of the several losses or damages sustained by such persons so claiming such recompence as aforesaid, according to the rules of equity, and as the case may require: provided always, that the plaintiff or plaintiffs in such bill shall annex to such bill an affidavit that he, she, or they do not directly or indirectly collude with any of the defendants thereto, or with any other owner or owners of the same ship or vessel, or with any other person or persons, but that such bill is filed for the purposes only of justice, and to obtain the benefit of the provisions of this act; and that the several persons named as defendants to the said bill, are, as the person or persons making such affidavit verily believes, all the persons claiming to be entitled to recompence for loss or damage sustained by the same accident, act, neglect or default, or on the same occasion; and that all such defendants do claim such

Proceedings in case the value of the ship, &c. is not sufficient to make compensation for damages.

recompence, and to be entitled to proportions of the value of such ship or vessel, appurtenances and freight; and that no other person claims to be entitled to any proportion thereof under the provisions of this act, and that the amount of the value of such ship or vessel, appurtenances and freight, does not exceed a sum to be specified in such affidavit, and that the several claims made by the defendants to such bill, do exceed the amount of the value of such ship or vessel, appurtenances and freight; and the plaintiff or plaintiffs in such bill shall, on filing such bill, apply to the court and obtain an order for liberty to pay into court the account of the value of such ship or vessel, appurtenances and freight, as ascertained by such affidavit, and shall pay the same into court according to such order; and no defendant or defendants to such bill shall be compellable to put in any answer thereto until such value shall have been paid into court as aforesaid, unless the court shall for any special cause think fit to order security to be given for the same, in such manner as the said court shall think fit, either instead of payment thereof into court as aforesaid, or until such court shall make other order to the contrary; and unless such money shall be paid into court as aforesaid, or the said court shall make such order for security as aforesaid, and such security shall be given according to the said order within one month after such bill shall have been filed, such bill shall immediately after the expiration of such month, stand dismissed without any motion for that purpose; and the court shall thereupon order the payment of the costs of the said suit to all the defendants who shall then have appeared to such bill; and in case such security shall be given as aforesaid, and such value shall afterwards be ordered to be paid into court, and the same shall not be so paid within the time to be limited by the court, such bill shall also stand dismissed without motion for that purpose, and the said court shall also order costs to be paid to the defendants as aforesaid; and in case any such bill shall at any time be dismissed after any such value shall have been paid into court, or such security given as aforesaid, such court shall direct the money so paid into court, if any, to be paid to the several claimants, defendants to such bill, who shall appear to the court to be entitled to proportions thereof, in such manner as to such court shall appear to be just, and shall order any security so to be given as aforesaid to be put in suit, and the money to be recovered thereupon to be paid into court and distributed in like manner; and such payments shall be without prejudice to any action or suit which may be brought or instituted by any other person or persons, not party or parties to such bill, for any such loss or damage as aforesaid, although such loss or damage shall have arisen or happened by the same accident, act, neglect or default, or on the same occasion as the losses or damages for which recompence shall be claimed by the parties defendants to such bill, and all such payments as shall be made under the order of the said court shall be without prejudice to the recovery of the costs in any action or suit which shall have been brought by any such defendant or defendants, unless such costs shall be otherwise provided for by the said court.

If the true
amount of the

VIII. Provided always, and be it further enacted, that if it shall appear to the court in which any such bill shall be filed as aforesaid,

that the money paid into court, or for which such security shall be given as aforesaid, is not the true amount of the value of such ship or vessel, appurtenances and freight, the said court shall order such further sum of money to be paid into court, or such further security to be given as to the said court shall seem proper; and the said court shall also at any time if the said court shall see fit, order security to be given for the costs of such suit as to the said court shall seem necessary and just; and if such further sum of money shall not be paid, or such further or other security shall not be given as aforesaid within the time to be limited by the said court for that purpose, such bill shall stand dismissed without any order for that purpose; and the said court shall thereupon order the payment of the costs of such suit to the several defendants by the plaintiffs, and give the proper directions for the application of any money paid into court, or due on any security given in such suit to answer the demands of the several defendants in such suit, as to such court shall appear to be just.

value of the vessel, &c. be not paid, the court shall require further payment, &c.

IX. And be it further enacted, that if after any such suit shall have been instituted the same shall become abated or imperfect in the whole or in part, and the same shall not be revived or made perfect within the time to be limited by the court for that purpose, such suit and all proceedings therein shall stand dismissed without any motion for that purpose; and the said court shall order the costs of such suit to be paid to the defendants thereto, or to the representatives of any who shall be then dead; and if the plaintiff or plaintiffs in any such suit, or any of them, shall be then dead, such costs as shall not be otherwise paid shall be a charge on the assets of such deceased plaintiff or plaintiffs, and shall be recoverable as a debt by simple contract.

In abatement of suits how costs to be paid.

X. And be it further enacted, that the court in which any such bill shall be filed as aforesaid, shall be and is hereby authorized and empowered to take all such measures as to such court shall seem just for ascertaining the value of the ship or vessel, appurtenances, and freight, the amount of the losses or damages claimed by the defendants thereto respectively, and all such matters and things as shall be necessary for the purposes of justice in such suit, and for payment and distribution of the value of such ship or vessel, appurtenances and freight, amongst the several persons entitled thereto, and generally to do therein as shall appear to be just; and the costs of all such proceedings shall be paid by the plaintiff or plaintiffs in such suit, unless such court shall think fit otherwise to order.

Court to take measures for ascertaining the value of vessels, &c.

XI. And be it further enacted, that all costs to be paid by the plaintiff or plaintiffs in any such suit in a court of equity as aforesaid shall be taxed and settled as between attorney and client, if the court shall think fit so to order.

Costs to be taxed.

XII. Provided also, and be it further enacted, that if any such bill shall be filed, and shall afterwards be dismissed by reason of any such default of the plaintiff or plaintiffs therein as hereinbefore provided, or under any order of the said court for that purpose, no new bill shall be filed by the same plaintiff or plaintiffs, or his, her, or their representatives, or by any other part-owner or part-owners of the same ship or vessel, unless the court in which such bill shall have

No new bills to be filed but under certain circumstances.

been filed shall order such dismissal to be without prejudice to the filing of a new bill, either absolutely or under such conditions as to the said court shall seem just.

Interest of money paid into court to belong to the parties entitled to the principal.

XIII. And be it further enacted, that if any money shall be paid into such court of equity as aforesaid, in respect of the value of any such ship or vessel, appurtenances, or freight, all interest and profit made thereof whilst such money shall remain in court shall be considered as belonging to the parties in such suit, who shall appear to be entitled to the principal money or proportions thereof respectively, and shall be divided and distributed accordingly; and if security shall be given for such value, or any part thereof, the same shall bear interest, and such interest shall be applied in like manner.

Any bill filed by one part-owner, to be equally binding on the others.

XIV. And be it further enacted, that if any such bill shall be filed as aforesaid by any part-owner or part-owners of any ship or vessel, on behalf of himself, herself, or themselves, and the other part-owners, such bill shall bind all such other part-owners, and their representatives, in the same manner as they would have been bound if parties plaintiffs to such bill; and if after the filing of any such bill any of the plaintiffs or other part-owners shall die, the right of action against such part-owner so dying, founded on any tort or wrong, shall not thereby be lost, but it shall be lawful to proceed against the respective representatives of the part-owners so dying, in the same manner as might have been if such right of action had been founded on contract.

Any court competent to act as court of equity, to be deemed such for purposes of act.

XV. And be it further enacted, that if any suit for any such loss or damage as aforesaid shall be instituted or depending in any court competent to act as a court of equity for the purposes of this act, such court shall, and is hereby authorized and empowered to proceed in such suit for such purposes, in the same manner, and under the same regulations, and with the same powers as are herein given to courts of equity, so far as the same are applicable to the nature of such court, and the forms of proceedings therein, and such court shall use all such means as a court of equity is by this act empowered to use for the purposes of this act.

Money paid for damage how to be accounted for.

XVI. And be it further enacted, that all and every sum and sums of money which shall be paid for or towards or on account of any loss or damage, in respect whereof the responsibility of the owners of any ship or vessel is limited by this act, or by the said acts or either of them, or any costs incurred in relation thereto, shall and may be brought into account among the part-owners of the same ship or vessel in such and the like manner as money disbursed for the use thereof.

Public act.

XVII. And be it further enacted, that this act shall be deemed and taken to be a public act, and shall be judicially taken notice of as such by all judges, justices, and other persons whomsoever, without the same being specially pleaded.

No. XXI.

6 Geo. 4, c. 94.

An Act to alter and amend an Act for the better protection of the Property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize, intrusted to Factors or Agents.

WHEREAS an act passed in the fourth year of the reign of his present Majesty, intituled, An Act for the better protection of the property of Merchants and others, who may hereafter enter into Contracts or Agreements in relation to Goods, Wares or Merchandize, intrusted to Factors or Agents: and whereas it is expedient to alter and amend the said act, and to make further provisions in relation to such contracts or agreements, as hereinafter provided: Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, any person or persons intrusted, for the purpose of consignment or of sale, with any goods, wares or merchandize, and who shall have shipped such goods, wares or merchandize in his, her, or their own name or names, and any person or persons in whose name or names any goods, wares or merchandize shall be shipped by any other person or persons, shall be deemed and taken to be the true owner or owners thereof, so far as to entitle the consignee or consignees of such goods, wares and merchandize to a lien thereon, in respect of any money or negotiable security or securities advanced or given by such consignee or consignees to or for the use of the person or persons in whose name or names such goods, wares or merchandize shall be shipped, or in respect of any money or negotiable security or securities received by him, her or them, to the use of such consignee or consignees, in the like manner to all intents and purposes as if such person or persons was or were the true owner or owners of such goods, wares and merchandize; provided such consignee or consignees shall not have notice by the bill of lading for the delivery of such goods, wares or merchandize, or otherwise, at or before the time of any advance of such money or negotiable security, or of such receipt of money or negotiable security in respect of which such lien is claimed, that such person or persons so shipping in his, her or their own name or names, or in whose name or names any goods, wares or merchandize shall be shipped by any person or persons, is or are not the actual and *bond fide* owner or owners, proprietor or proprietors of such goods, wares and merchandize so shipped as aforesaid, any law, usage or custom to the contrary thereof in anywise notwithstanding: provided also, that the person or persons in whose name or names any such goods, wares or merchandize are so shipped as aforesaid, shall be taken, for the purposes of this act, to have been intrusted therewith for the purpose of consignment or of sale, unless the contrary thereof shall be made to appear by bill of discovery or otherwise, or be made to appear, or be shown in evidence by any person disputing such fact.

4 Geo. 4, c.
83.

Factors or agents having goods or merchandize in their possession, shall be deemed to be the true owners, so as to give validity to contracts with persons dealing *bond fide* upon the faith of such property.

Persons in possession, of bills of lading, &c. to be the owner so far as to make valid contracts.

II. And be it further enacted, that from and after the first day of October, one thousand eight hundred and twenty-six, any person or persons intrusted with and in possession of any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for delivery of goods, shall be deemed and taken to be the true owner or owners of the goods, wares and merchandize described and mentioned in the said several documents hereinbefore stated respectively, or either of them, so far as to give validity to any contract or agreement thereafter to be made or entered into by such person or persons so intrusted and in possession as aforesaid, with any person or persons, body or bodies politic or corporate, for the sale or disposition of the said goods, wares and merchandize, or any part thereof, or for the deposit or pledge thereof, or any part thereof, as a security for any money or negotiable instrument or instruments advanced or given by such person or persons, body or bodies politic or corporate, upon the faith of such several documents or either of them; provided such person or persons, body or bodies politic or corporate, shall not have notice by such documents or either of them, or otherwise, that such person or persons so intrusted as aforesaid is or are not the actual and *bond fide* owner or owners, proprietor or proprietors of such goods, wares or merchandize so sold or deposited or pledged as aforesaid; any law, usage or custom to the contrary thereof in anywise notwithstanding.

No person to acquire a security upon goods in the hands of an agent for an antecedent debt, beyond the amount of the agent's interest in the goods.

III. Provided always, and be it further enacted, that in case any person or persons, body or bodies politic or corporate, shall, after the passing of this act, accept and take any such goods, wares or merchandize in deposit or pledge from any such person or persons so in possession and intrusted as aforesaid, without notice as aforesaid, as a security for any debt or demand due and owing from such person or persons so intrusted and in possession as aforesaid, to such person or persons, body or bodies politic or corporate, before the time of such deposit or pledge, then and in that case such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares or merchandize in deposit or pledge, shall acquire no further or other right, title, or interest in or upon or to the said goods, wares or merchandize, or any such document as aforesaid, than was possessed, or could or might have been enforced by the said person or persons so possessed and intrusted as aforesaid, at the time of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, so accepting or taking such goods, wares or merchandize in deposit or pledge, shall and may acquire, possess, and enforce such right, title or interest as was possessed and might have been enforced by such person or persons so possessed and intrusted as aforesaid; any rule of law, usage, or custom to the contrary notwithstanding.

Persons may contract with known agents in the ordinary course of business, or out of that course if within the

IV. And be it further enacted, that from and after the first day of October one thousand eight hundred and twenty-six, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to contract with any agent or agents, intrusted with any goods, wares or merchandize, or to whom the same may be consigned, for the purchase of any such goods, wares and merchandize. and to receive the same of and pay for the same to such agent or agents;

and such contract and payment shall be binding upon and good against the owner of such goods, wares and merchandize, notwithstanding such person or persons, body or bodies politic or corporate, shall have notice that the person or persons making and entering into such contract, or on whose behalf such contract is made or entered into, is an agent or agents; provided such contract and payment be made in the usual and ordinary course of business, and that such person or persons, body or bodies politic or corporate, shall not, when such contract is entered into or payment made, have notice that such agent or agents is or are not authorized to sell the said goods, wares and merchandize, or to receive the said purchase money.

agent's authority.

V. And be it further enacted, that from and after the passing of this act, it shall be lawful to and for any person or persons, body or bodies politic or corporate, to accept and take any such goods, wares or merchandize, or any such document as aforesaid, in deposit or pledge from any such factor or factors, agent or agents, notwithstanding such person or persons, body or bodies politic or corporate, shall have such notice as aforesaid, that the person or persons making such deposit or pledge is or are a factor or factors, agent or agents; but then and in that case such person or persons, body or bodies politic or corporate, shall acquire no further or other right, title or interest in or upon or to the said goods, wares or merchandize, or any such document as aforesaid, for the delivery thereof, than was possessed or could or might have been enforced by the said factor or factors, agent or agents, at the sum of such deposit or pledge as a security as last aforesaid; but such person or persons, body or bodies politic or corporate, shall and may acquire, possess, and enforce such right, title or interest as was possessed and might have been enforced by such factor or factors, agent or agents, at the time of such deposit or pledge as aforesaid; any rule or law, usage or custom to the contrary notwithstanding.

Persons may accept and take goods, &c. in pledge from known agents; but in that case shall acquire no further interest than was possessed by such agent at the time of such pledge.

VI. Provided always, and be it enacted, That nothing herein contained shall be deemed, construed, or taken to deprive or prevent the true owner or owners, or proprietor or proprietors, of such goods, wares or merchandize, from demanding and recovering the same from his, her or their factor or factors, agent or agents, before the same shall have been so sold, deposited, or pledged, or from the assignee or assignees of such factor or factors, agent or agents, in the event of his, her or their bankruptcy; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from any person or persons, body or bodies politic or corporate, the price or sum agreed to be paid for the purchase of such goods, wares or merchandize, subject to any right of set-off on the part of such person or persons, body or bodies politic or corporate, against such factor or factors, agent or agents; nor to prevent such owner or owners, proprietor or proprietors, from demanding or recovering of and from such person or persons, body or bodies politic or corporate, such goods, wares or merchandize so deposited or pledged, upon repayment of the money, or on restoration of the negotiable instrument or instruments so advanced or given on the security of such goods, wares or merchandize as aforesaid, by such

Right of the true owner to follow his goods while in the hands of his agent or of his assignee, in case of bankruptcy, or to recover them from a third person, upon paying his advances secured upon them.

In case of bankruptcy of factor, the owner of goods so pledged and redeemed shall be held to have discharged *pro tanto* the debt due from him to bankrupt.

Agents fraudulently pledging the goods of their principals deemed guilty of a misdemeanor;

may be transported not exceeding fourteen years, &c.

Not to extend to cases in which the agent has not made the goods a security for any sum beyond the extent of his own lien.

Acceptances of bills by an agent not to create a lien so as to excuse

person or persons, body or bodies politic or corporate, to such factor or factors, agent or agents; and upon payment of such further sum of money, or on restoration of such other negotiable instrument or instruments (if any) as may have been advanced or given by such factor or factors, agent or agents, to such owner or owners, proprietor or proprietors, or on payment of a sum of money equal to the amount of such instrument or instruments; nor to prevent the said owner or owners, proprietor or proprietors, from recovering of and from such person or persons, body or bodies politic or corporate, any balance or sum of money remaining in his, her or their hands, as the produce of the sale of such goods, wares or merchandize, after deducting thereout the amount of the money, or negotiable instrument or instruments, so advanced or given upon the security thereof as aforesaid: provided always, That in case of the bankruptcy of any such factor or agent, the owner or owners, proprietor or proprietors of the goods, wares and merchandize so pledged and redeemed as aforesaid, shall be held to have discharged *pro tanto* the debt due by him, her or them to the estate of such bankrupt.

VII. And whereas it is expedient to prevent the improper deposit or pledge of goods, wares or merchandize, or the documents relating to such goods, wares or merchandize, intrusted or consigned as aforesaid to factors or agents; be it therefore enacted, That if any such factor or agent, at any time from and after the said first day of October one thousand eight hundred and twenty-six, shall deposit or pledge any goods, wares or merchandize, intrusted or consigned as aforesaid to his, or her care or management, or any of the said several documents so possessed or intrusted as aforesaid, with any person or persons, body or bodies politic or corporate, as a security for any money or negotiable instrument or instruments, borrowed or received by such factor or agent, and shall apply or dispose thereof to his, or her own use, in violation of good faith, and with intent to defraud the owner or owners of any such goods, wares or merchandize, every person so offending, in any part of the United Kingdom, shall be deemed and taken to be guilty of a misdemeanor, and being convicted thereof according to law, shall be sentenced to transportation for any term not exceeding fourteen years, or to receive such other punishment as may by law be inflicted on persons guilty of a misdemeanor, and as the court before whom such offender may be tried and convicted shall adjudge.

VIII. Provided always, and be it further enacted, That nothing herein contained shall extend or be construed to extend to subject any person or persons to prosecution, for having deposited or pledged any goods, wares or merchandize, so intrusted or consigned to him, her or them, provided the same shall not be made a security for or subject to the payment of any greater sum or sums of money than at the time of such deposit or pledge was justly due and owing to such person or persons from his, her or their principal or principals: provided nevertheless, that the acceptance of bills of exchange by such person or persons drawn by or on account of such principal or principals, shall not be considered as constituting any part of such debt so due and owing from such principal or principals within the

true intent and meaning of this act, so as to excuse the consequence of such a deposit or pledge, unless such bills shall be paid when the same shall respectively become due.

the pledge, unless the bills are paid when due.

IX. Provided also, and be it further enacted, That the penalty by this act annexed to the commission of any offence intended to be guarded against by this act, shall not extend or be construed to extend to any partner or partners, or other person or persons of or belonging to any partnership, society or firm, except only such partner or partners, person or persons, as shall be accessory or privy to the commission of such offence; any thing herein contained to the contrary in anywise notwithstanding.

Act not to extend to partners not being privy to the offence.

X. Provided also, and be it further enacted, That nothing in this act contained, nor any proceeding, conviction or judgment, to be had or taken thereupon, shall hinder, prevent, lessen or impeach, any remedy at law or in equity, which any party or parties aggrieved by any offence against this act, might or would have had, or have been entitled to against any such offender if this act had not been made, nor any proceeding, conviction or judgment, had been had or taken thereupon; but nevertheless, the conviction of any offender against this act shall not be received in evidence in any action at law or suit in equity against such offender: And further, that no person shall be liable to be convicted by any evidence whatever as an offender against this act, in respect of any act, matter or thing done by him, if he shall at any time previously to his being indicted for such offence have disclosed any such matter or thing on oath, under or in consequences of any compulsory process of any court of law or equity, in any action, suit or proceeding, in or to which he shall have been a party, and which shall have been *bond fide* instituted by the party aggrieved by the act, matter or thing, which shall have been committed by such offender aforesaid.

Act not to lessen any remedy at law or equity which the party aggrieved may be entitled to adopt.

No. XXII.

STATUTES RELATING TO SALVAGE.

12 Anne, stat. 2, c. 18.

An Act for Preserving all such Ships and Goods thereof, which shall happen to be forced on Shore, or stranded upon the Coasts of this Kingdom, or any other of her Majesty's dominions.

“WHEREAS by an act made in the third year of the reign of king Edward the First, concerning wrecks at sea, it is enacted, that where a man, a dog or a cat, escape quick out of the ship, that such ship, nor barge, nor any thing in them, shall be adjudged a wreck, but the goods shall be saved, and kept by view of the sheriff, coroner, or the king's bailiff, and delivered into the hands of such as are of the town where the goods were found; so that if any sue for those

3 Ed. 1, c. 4

4 Ed. 1, stat.
2.

Sheriffs,
mayors, &c.
and custom-
house officers
to summon
men to assist
ships in dis-
tress.

All ships to
assist,

on forfeiture of
100*l*.

goods, and after prove that they were his, or perished within his keeping, within a year and a day, they shall be restored to him, without delay, and if not, they shall remain to the king, or to such others to whom the wreck belongeth; and he that otherwise doth, and thereof be attainted, shall be awarded to prison, and make fine at the king's will: And whereas by another act made in the fourth year of the reign of the said king Edward the First, [intituled, *De officio Coronatoris*], concerning the wreck of the sea, it is enacted, that wheresoever it be found, if any lay hands of it, he shall be attached by sufficient pledges, and the price of the wreck shall be valued, and delivered to the town: And whereas great complaints have been made by several merchants, as well her Majesty's subjects, as foreigners trading to and from this kingdom, that many ships of trade, after all their dangers at sea escaped, have unfortunately, near home, run on shore, or been stranded on the coasts thereof; and that such ships have been barbarously plundered by her Majesty's subjects, and their cargoes embezzled, and when any part thereof has been saved, it has been swallowed up by exorbitant demands for salvage, to the great loss of her Majesty's revenue, and to the much greater damage of her Majesty's trading subjects:" For remedy whereof, be it enacted by the queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, That the sheriffs, justices of the peace of every county, or county of a city or town, and also all mayors, bailiffs, and other head officers of corporations and port-towns near adjoining to the sea, and all constables, headboroughs, tythingmen, and officers of the customs in all and every such places, shall upon application made to them, or any of them, by or on the behalf of any commander, or chief officer of any ship or vessel of any of her Majesty's subjects or others, being in danger of being stranded or run on shore, or being stranded or run on shore, are hereby empowered and required to command the constables of the several ports within her Majesty's dominions, nearest to the sea-coasts where any such ship or vessel shall be in danger as aforesaid, to summon and call together as many men as shall be thought necessary to the assistance and for the preservation of such ship or vessel, so in distress as aforesaid, and their cargoes; and that if there shall been any ship or vessel, either man of war or merchant ship, belonging to her Majesty, or any of her subjects, riding at anchor near the place where such ship or vessel is in distress or danger as aforesaid, the officers of the customs, and constables above mentioned, or any of them, are hereby empowered and required to demand of the superior officers of such ship or vessel, so riding at anchor as aforesaid, assistance by their boats, and such hands as they can conveniently spare for the said service and preservation of the said ship or vessel, so in distress as aforesaid; and that in case such superior officer of such ship or vessel, riding at anchor as aforesaid, shall refuse or neglect to give such assistance, he shall forfeit for the same the sum of one hundred pounds, to be recovered by the superior officer of the said ship or vessel, so in distress as aforesaid, together with their costs of suit, in any of her Majesty's courts of record, by action, debt, bill, plaint, or

information, wherein no essoign, wager of law, or protection shall be allowed.

II. "And, for the encouragement of such persons as shall give their assistance to such ships or vessels, so in distress as aforesaid:" be it further enacted, that the said collectors of the customs, and the master or commanding officer of any ships or vessels, and all others who shall act or be employed in the preserving of any such ship or vessel, in distress as aforesaid, or their cargoes, shall, within *thirty* days after the service performed, be paid a reasonable reward for the same, by the commander, master, or other superior officer, marines, or owners of the ship or vessel, so in distress as aforesaid, or by the merchant, whose ship, vessel, or goods shall be so saved as aforesaid; and in default thereof the said ship, vessel, or goods so saved as aforesaid, shall remain in the custody of such officer of the customs, or his deputy, until such time that all charges shall be paid, and until the said officer of the customs, or his deputy, and the said master or other officer of the ship or vessel, and all others so employed as aforesaid, shall be reasonably gratified for their said assistance and trouble, or good security given for that purpose to the satisfaction of the several parties that are to receive the same; and that in case, after such salvage, the commander or other superior officer, mariners, or owners of such ship or vessel so saved as aforesaid, or merchant whose goods shall be so saved as aforesaid, shall disagree with the said officer of the customs, or his deputy, touching the monies deserved by any of the persons so employed as aforesaid, it shall be lawful for the commander of such ship or vessel so saved, or the owner of the goods, or the merchant interested therein, and also for the said officer of the customs, or his deputy, to nominate *three* of the neighbouring justices of the peace, who shall thereupon adjust the *quantum* of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of the said ship, vessel, or goods; and such adjustments shall be binding to all parties, and shall be recoverable in an action at law, to be brought in any of her Majesty's courts of record, by the respective persons to whom the same shall be allotted by the said justices of peace; and in case it shall happen that no persons shall appear to make his claim to all or any of the goods that shall be saved, that then and in such case the chief officer of the customs of the nearest port to the place where the said ship or vessel was so in distress as aforesaid, shall apply to *three* of the nearest justices of the peace, who shall put him or some other responsible person in possession of the said goods, such justices of peace taking an account in writing of the said goods, to be signed by such officer of the customs; and if the said goods shall not be legally claimed within the space of twelve months next ensuing, by the rightful owner thereof, then public sale shall be made thereof, and if perishable goods, forthwith to be sold, and after all charges deducted, the residue of the monies arising by such sale, with a fair and just account of the whole, shall be transmitted to her Majesty's Exchequer, there to remain for the benefit of the rightful owner when appearing, who upon affidavit or other proof made of his or their right or property thereto, to the satisfaction of one of the barons of

Reasonable salvage to be made.
By 5 Geo. 1, c. 11, s. 13, goods saved from stranded ships are to pay custom.

Three justices to adjust the quantum.

Goods not claimed in 12 months to be sold,

and the monies transmitted into the exchequer, &c.

the coif of the Exchequer, shall, upon his order, receive the same out of the Exchequer.

Persons entering ships without leave,

or hindering the saving the ship, to make double satisfaction.

Master may repel pressers into the ship.

Goods carried off, to be immediately delivered up.

Penalty treble the value.

Making holes in the ship, &c. felony.

General issue.

III. And it is hereby also enacted, that if any person or persons whatsoever, besides those empowered by the said officer of the customs, or his deputy, and the constables as aforesaid, shall enter or endeavour to enter on board any such ship or vessel, so in distress as aforesaid, without the leave or consent of the commander, or other superior officer of the said ship, or of the said officer of the customs, or his deputy, or of the said constable, or some or one of them employed for the service and preservation of the said ship or vessel, as aforesaid; or in case any person shall molest him, them, or any of them, in the saving of the said ship, vessel, or goods, or shall endeavour to impede or hinder the saving of any such ship, vessel, or goods, or when any such goods are saved, shall take out or deface the marks of any such goods, before the same shall be taken down in a book or books for that purpose provided by the commander or ruling officer, and the first officer of the customs as aforesaid, such person or persons shall, within the space of twenty days, make double satisfaction to the party grieved, at the discretion of the two next justices of peace, or in default thereof, shall by such justices of peace be sent to the next house of correction, where he shall continue and be employed in hard labour by the space of twelve months then next ensuing; and that it shall be lawful for any commander or superior officer of the said ship or vessel, so in distress as aforesaid, or for the said officer of the customs, or constables on board the same ship or vessel, to repel by force any such person or persons as shall, without such leave or consent from the said commander or superior officer, or the said officer of the customs, or his deputy, or such constables as aforesaid, press on board the said ship or vessel, so in distress, as aforesaid, and thereby molest them in the preservation of the said ship or vessel, so in distress, as aforesaid.

IV. And it is hereby likewise enacted, that in case any goods shall be found upon any person or persons, that were stolen or carried off from any such ship or vessel, so in distress as aforesaid, he, she, or they, on whom such goods shall be found, shall immediately, upon demand, deliver the same to the owner thereof, or to such person by such owner authorized to receive the same; or in default thereof, shall be liable to pay treble the value of such goods, to be recovered by such owner in an action at law to be brought for the same.

V. And it is hereby moreover enacted, that if any person or persons shall make, or be assisting in the making; any hole in the bottom, side, or any other part of any ship or vessel, so in distress as aforesaid, or shall steal any pump belonging to any ship or vessel, so in distress as aforesaid, or shall be aiding or abetting in the stealing such pump as aforesaid, or shall wilfully do anything tending to the immediate loss or destruction of such ship or vessel, such person or persons shall be and are hereby made guilty of felony, without any benefit of his, her, or their clergy.

VI. And be it further enacted by the authority aforesaid, that

if any action, suit, or information, shall be commenced or prosecuted against any person or persons, for anything that he or they shall do, or cause to be done, in pursuance of this act, and executing any of the powers and authorities, or any of the orders or directions therein mentioned, all and every person and persons, so sued in any court whatsoever, shall and may plead the general issue, and give this act and the special matter in evidence; and if in any such suit the plaintiff or prosecutor shall become nonsuit, or forbear prosecution, or discontinue the suit, or if a verdict shall pass against him, or judgment be given against him upon a demurrer, then in any of the said cases the defendant or defendants shall recover full costs, for which he and they shall have the like remedy, as where costs by law are awarded; and this act shall be taken and allowed in all courts within this kingdom as a public act; and all judges and justices are hereby required to take notice thereof as such without special pleading of the same.

Public act.

VII. Provided nevertheless, if any officer of the customs, or his deputy, so empowered as above, shall, by fraud or wilful neglect, abuse the trust so hereby reposed in him as aforesaid, and shall be convicted thereof in due form of law, such officer, or his deputy, shall respectively forfeit treble damages to the party grieved, to be recovered in any action or suit to be brought in any court of record, and shall from thenceforth be fully disabled and rendered incapable of the same, or any other employment relating to the said customs.

Custom-house officer abusing his trust, to forfeit treble damages, and disabled.

VIII. And it is hereby further enacted, that this act, and the several clauses herein contained, shall take effect from and after the first day of August, in the year of our Lord one thousand seven hundred and fourteen; and that, for the better observing of the same, this act shall be read four times in the year in all the parish churches and chapels of every sea-port town, and upon the sea-coast in this kingdom, upon the Sundays next before Michaelmas-day, Christmas-day, Lady-day, and Midsummer-day in the morning, immediately after the prayers, and before the sermon.

Act to commence 1st Aug. 1714, and to be read four times in the year on Sundays in sea-port towns.

IX. Provided always, and it is hereby enacted, that neither this act, nor anything herein contained, shall anyways extend to deprive, or anyways prejudice her royal Majesty, her heirs, or successors, or any claiming under them, or any of them, or any patentee or grantee of the crown, or any lord or lords of any manor or manors, or other person whatsoever, of or in relation to any right which they, or any of them respectively have, or shall have, or lawfully may claim to any wreck or wrecks, or any goods that are or shall be floatsam, jetsam, or lagan; but that such respective rights shall be enjoyed in as full, ample, and beneficial a manner, in every respect, as if this act had never been made.

Claims to wrecks saved.

X. Provided, that this act shall continue in force for the space of three years, and from thence to the end of the next session of Parliament, and no longer.

Continuation.

[Made perpetual by 4 Geo. 1, c. 12.]

26 Geo. 2, c. 19.

An Act for enforcing the Laws against Persons who shall Steal or Detain Shipwrecked Goods; and for the Relief of Persons suffering Losses thereby.

Persons convicted in plundering shipwrecked goods, &c. or of obstructing the escape of any person from a wreck, or of putting out false lights to suffer death without clergy.

Where goods of small value shall be stolen without any circumstances of cruelty, the offender may be indicted for petit larceny.

Justices upon information of shipwrecked goods being stolen, or concealed, to issue search warrants;

"WHEREAS, notwithstanding the good and salutary laws now in being against plundering and destroying vessels in distress, and against taking away shipwrecked, lost, or stranded goods, many wicked enormities have been committed, to the disgrace of the nation, and to the grievous damage of merchants and mariners of our own and other countries:" for remedy thereof, be it enacted by the king's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that if any person or persons shall plunder, steal, take away, or destroy any goods or merchandize, or other effects, from or belonging to any ship or vessel of his Majesty's subjects, or others, which shall be in distress, or which shall be wrecked, lost, stranded, or cast on shore in any part of his Majesty's dominions (whether any living creature be on board such vessel or not), or any of the furniture, tackle, apparel, provision, or part of such ship or vessel; or shall beat or wound with intent to kill or destroy, or shall otherwise wilfully obstruct the escape of any person endeavouring to save his or her life from such ship or vessel, or the wreck thereof; or if any person or persons shall put out any false light, or lights, with intention to bring any ship or vessel into danger; then such person or persons so offending shall be deemed guilty of felony, and being lawfully convicted thereof, shall suffer death as in cases of felony, without benefit of clergy.

II. Provided always, and be it enacted by the authority aforesaid, that when goods or effects of small value shall be stranded, lost or cast on shore, and shall be stolen without circumstances of cruelty, outrage, or violence; then and in such cases, it shall be lawful for any person or persons to prosecute for such offence by way of indictment for petit larceny; and the offenders being thereof lawfully convicted, shall suffer such punishment as the laws in cases of petit larceny do enjoin or require.

III. And be it further enacted by the authority aforesaid, That it shall be lawful for any one or more of his Majesty's justices of the peace, upon information made before him or them upon oath (which oath all justices are hereby empowered to administer) of any part of the cargo or effects whatsoever belonging to any ship or vessel lost or stranded upon or near the coasts aforesaid, being unlawfully carried or conveyed away, or concealed in any house, out-house, barn, or other place, or of some reasonable cause of suspicion thereof, to issue his or their warrant or warrants for the searching of such house, out-house, barn or other place, as in other cases of stolen goods: And if the same shall be found in such house, out-house, barn or other place or places, or upon or in the custody or possession of any person or persons not legally authorized or entitled to keep and withhold the same; and the owner or occupier of such house, out-house, barn

or other place, or the person or persons upon whom, or in whose custody or possession the same shall be found, shall not immediately, upon demand, deliver the same to the lawful owner or owners thereof, or to such other person or persons as shall be lawfully authorized to demand the same; or shall not give a good account, to the satisfaction of the said justice or justices, how he, she or they came by or became possessed thereof; it shall and may be lawful to and for such justice or justices, upon proof of such refusal, and he and they is and are hereby required to commit the said offender or offenders to the common gaol for the space of six months, or until he, she or they shall have paid to such lawful owner or owners, or to the person or persons lawfully authorized to receive the same, treble the value of the goods or things so by him, her or them, unlawfully detained.

and the persons in whose custody the goods shall be found, not giving a satisfactory account to be committed for six months, or until payment of treble value.

IV. And be it further enacted by the authority aforesaid, That if any person or persons shall offer or expose to sale any goods or effects whatsoever belonging to any ship or vessel lost, stranded or cast on shore as aforesaid, and unlawfully taken away, or reasonably suspected so to have been; then and in every such case it shall be lawful for the person or persons to whom the same shall be offered for sale, or any officer of the customs or excise, or any constable, headborough or tythingman, or other peace officer, to stop, take and detain the said goods and effects; and that he or they shall, with all convenient speed, carry the same, or give notice of such seizure to some one or more of his Majesty's justice or justices of the peace; and if the person or persons who shall have offered the said goods or effects to sale, or some other person or persons on his, her or their behalf, shall not appear before the said justice within ten days after such seizure, and make out to the satisfaction of the said justice the property of the said goods or effects to be in him, her or them, or in the person or persons by whom he, she or they were employed to sell the same; then the said goods or effects shall, by order of the said justice, be forthwith delivered over to or for the use of the rightful owner or owners thereof, upon payment of a reasonable reward for such seizure (to be ascertained by the said justice) to the person who seized the same; and such justice shall and may commit the person or persons who shall so have offered or exposed the said goods or things to sale as aforesaid, to the common gaol for the space of six months, or until he, she or they shall have paid to such lawful owner or owners, or to the person or persons lawfully authorized to receive the same, treble the value of the said goods or effects so by him, her or them, unlawfully offered to sale as aforesaid.

Goods offered to sale, suspected to be shipwrecked, to be stopped,

and notice to be given to a justice,

and the person offering the same not making out his property,

the goods to be returned to the owner,

and the offender to be committed for six months, or till payment of treble value.

V. And be it further enacted by the authority aforesaid, That in case any person or persons not employed by the master, mariners or owners, or other persons lawfully authorized in the salvage of any ship or vessel, or the cargo or provision thereof, shall, in the absence of persons so employed or authorized, save any such ship, vessel, goods or effects, and cause the same to be carried, for the benefit of the owners or proprietors, into port, or to any near adjoining custom-house or other place of safe custody, immediately giving notice thereof to some justice of the peace, magistrate, or custom-

Persons who shall save and carry any vessel or goods into port, &c. for the benefit of the owners, and give notice thereof; or who shall discover where

such goods are concealed, entitled to the reward; and the quantum in case of disagreement, is to be adjusted according to 12 Ann. stat. 2, c. 18.

Where any vessel or effects shall be stranded; public notice to be given for a meeting of the sheriff, justices and magistrates, &c.

who are to aid in saving the vessel and goods, &c.

and to adjust the salvage;

4s. a day allowed for their attendance.

If the salvage be not paid, the officer of the customs may raise the same by a bill of sale of the vessel or cargo; which may be redeemed, upon payment of principal and interest.

house or excise officer, or shall discover to any such magistrate or officer where any such goods or effects are wrongfully bought, sold or concealed, then such person or persons shall be entitled to a reasonable reward for such services, to be paid by the masters or owners of such vessels or goods, and to be adjusted, in case of disagreement about the *quantum*, in like manner as the salvage is to be adjusted and paid by virtue of the statute made in the twelfth year of the reign of her late Majesty Queen Anne, intituled, "An Act for the Preserving all such Ships and Goods thereof, which have happened to be forced on Shore, or stranded upon the Coasts of this Kingdom, or any other of her Majesty's dominions, or else in the manner hereinafter prescribed, as the case shall require."*

VI. And be it further enacted by the authority aforesaid, That for the better ascertaining the salvage to be paid in pursuance of this present act, and the act before-mentioned, and for the more effectual putting the same acts in execution, the justice of the peace, mayor, bailiff, collector of the customs, or chief constable, who shall be nearest to the place where any ship, goods or effects shall be stranded or cast away, shall forthwith give public notice for a meeting to be held as soon as possible of the sheriff or his deputy, the justices of the peace, mayors, or other chief magistrates of towns corporate, coroners and commissioners of the land-tax, or any five or more of them, who are hereby required and empowered to give aid in the execution of this and the said former act, and to employ proper persons for the saving of ships in distress, and such ships, vessels and effects, as shall be stranded or cast away; and also to examine persons upon oath touching or concerning the same, or the salvage thereof, and to adjust the *quantum* of such salvage, and distribute the same among the persons concerned in such salvage, in case of disagreement among the parties, or the said persons; and that every such sheriff, justice of the peace, mayor, chief magistrate, coroner, lord of a manor, under sheriff, or commissioner of the land tax, attending and acting at such meeting, shall be paid four shillings a day for his expenses in such attendance out of the goods and effects saved by their care or direction.

VII. Provided always, and be it further enacted by the authority aforesaid, That if the charges and rewards for salvage, directed to be paid by the said act of the twelfth year of the reign of her said late Majesty queen Anne, and by this present act, shall not be fully paid, or sufficient security given for the same within forty days next after the said services performed, then and in such case it shall be lawful for the officer of the customs concerned in such salvage, to borrow or raise so much money as shall be sufficient to satisfy and pay such charges and rewards, or any part thereof then remaining unpaid, or not secured as aforesaid, by or upon one or more bill or bills of sale, under his hand and seal, of the ship or vessel, or cargo saved, or such part thereof as shall be sufficient, redeemable nevertheless upon payment of the principal sum so borrowed, and interest for the same after the rate of four pounds *per centum per annum*.

VIII. And be it further enacted by the authority aforesaid, That if oath shall be made before any magistrate, lawfully empowered to take the same, of any such plunder or theft, and the examination in writing thereupon taken shall be delivered to the clerk of the peace of the county, riding, or division wherein such fact shall be committed, or to his deputy; or if oath shall be made before any such magistrate of the breaking any ship, contrary to the aforesaid act made in the twelfth year of the reign of her said late Majesty queen Anne, and the examination in writing thereupon taken shall be delivered to such clerk of the peace, or his deputy; then, such clerk of the peace shall cause the offender or offenders in any of the said cases to be forthwith prosecuted for the same, either in the county where the fact shall be committed, or in any county next adjoining; in which adjoining county any indictment may be laid by any other prosecutor; and if the fact be committed in Wales, then the prosecution shall or may be carried on in the next adjoining English county; and the necessary charges of such prosecutions by the clerk of the peace shall be paid by the treasurer of the county, riding or division where the fact shall be committed, to such amount as the justices of the peace in their general or quarter-sessions shall order and ascertain the same; and if such clerk of the peace shall neglect or refuse to carry on such prosecution in due manner, he shall forfeit one hundred pounds for every such offence, to any person or persons who shall sue for the same by action of debt, bill, plaint or information, in any of his Majesty's courts of record at Westminster; in which action no essoin, protection, wager of law, or more than one imparlance shall be allowed.

IX. And be it further enacted by the authority aforesaid, That the commissioners of the land tax, the deputy sheriff, the coroner, and the officers of excise in each county, riding and division, shall be proper officers for putting in execution this present act, and the said act made in the twelfth year of the reign of her late Majesty Queen Anne, together with those therein respectively named for that purpose.

X. "And whereas by an act made in the third year of the reign of his late Majesty king George the First, intituled, An Act for the better regulating of Pilots for the conducting of Ships and Vessels from Dover, Deal, and the Isle of Thanet, up the Rivers of Thames and Medway, it is enacted, That the lord warden of the Cinque Ports for the time being shall nominate and appoint, by an instrument under his hand and seal, three or more substantial persons in each of the Cinque Ports, two ancient towns and their members, to adjust and determine, within the space of twelve hours, differences which shall or may arise within the jurisdiction of the Cinque Ports relating to the salvage of anchors and cables from which vessels shall or may be forced by extremity of weather:" Now it is hereby enacted, That the lord warden of the Cinque Ports for the time being, and the lieutenant of Dover Castle for the time being, and the deputy warden of the Cinque Ports for the time being, and the judge official and commissary of the court of Admiralty of the Cinque Ports, two ancient towns, and the members thereof for the time being, and all and every of them, and all and every other person and persons ap-

Where oath shall be made of plunder or theft, or of breaking a ship, contrary to 12 Ann. stat. 2, c. 18, and the examination shall be delivered to the clerk of the peace, he is to prosecute the offender; and the charges to be paid by the treasurer of the county; clerk of the peace neglecting to prosecute, forfeits 100*l*.

Officers for putting this and 12 Ann. stat. 2, c. 18, in execution.

3 Geo. 1, c. 13.

Officers for putting this and 12 Ann. in execution within the liberty of the Cinque Ports, &c.

pointed or to be appointed by the lord warden of the Cinque Ports for the time being, pursuant to the said act made in the third year of his late Majesty's reign, shall be the persons to put in execution, within the liberty and jurisdiction of the Cinque Ports, two ancient towns and their members, all the powers and authorities given and granted in and by this act, and in and by the before-mentioned act of Parliament made in the twelfth year of her said late Majesty Queen Anne; and also in and by the said act made in the fourth year of the reign of his late Majesty king George the First; and also shall and may execute, perform and do, within the jurisdictions aforesaid, all the acts, matters, and things contained in this and the before mentioned statutes, in like and as full and ample manner, to all intents and purposes, as any justice or justices of peace, or any other person or persons, are by this and the said acts appointed or authorized to do in any other part of the kingdom.

Persons convicted of assaulting any magistrate or officer, &c. in the salvage of any vessel or goods, to be transported for seven years.

XI. And be it further enacted by the authority aforesaid, that if any sheriff or his deputy, justice of the peace, mayor or other magistrate, coroner, lord of a manor, commissioner of the land-tax, chief constable or petty constable, or other peace officer, or any custom-house or excise officer, or other person lawfully authorized, shall be assaulted, beaten and wounded, for or on account of the exercise of his or their duty, in or concerning the salvage or preservation of any ship or vessel in distress, or of any ship or vessel, goods or effects, stranded, wrecked, or cast on shore, or lying under water, in any of his Majesty's dominions, then any person or persons so assaulting, beating and wounding, shall, upon trial and conviction, by indictment at the assizes, or general gaol-delivery, or at the general or quarter sessions for the county, riding or division, where such offence shall be committed, be transported for seven years to some of his Majesty's colonies in America, and shall be subject to such subsequent punishment, in case of return before that time, as other persons under sentence of transportation are by the law subjected unto.

Justice in the absence of the sheriff may take a sufficient force to repress violence, &c.

XII. And be it further enacted by the authority aforesaid, that it shall be lawful for any one or more of his Majesty's justices of the peace, in case of need, and in the absence of the high sheriff, to take sufficient power of the county, to repress all unjust violence, and duly to enforce the execution of this act.

Persons empowered to give orders, where any shall be assembled in case of a shipwreck, &c.

XIII. And, to prevent confusion among persons assembled to save any ship, vessel, goods or effects, as aforesaid, either for want of proper orders, or by contradictory orders: be it further enacted, that all persons so assembled shall conform in the first place to the orders of the master or other officers or owners, or other persons employed by them; and for want of their presence or directions, then in the next place to the orders of the persons authorized by this act, or the aforesaid act of Queen Anne, in the like manner, in the following subordination, as any of the said persons shall happen to be present; that is to say, in the first place, to the orders of any officer or officers of the customs; then of any officer or officers of the excise: then of the sheriff or his deputy; then of any justice or justices of the peace; then of the mayor or chief magistrate of any corporation; then of the coroner; then of any commissioners of the land tax; then of any chief constable; then of any petty constable or other peace officers;

and any person whatsoever acting knowingly and wilfully contrary to such orders, shall forfeit any sum not exceeding five pounds, to be levied by warrant of one justice of the peace; and in case of non-payment, the offender shall be committed to the house of correction for any time not exceeding three months.

Person acting contrary to orders forfeit 5*l*.

XIV. Provided always, and it is hereby enacted, that neither this act, nor any thing herein contained, shall any way extend to deprive or prejudice his royal Majesty, his heirs or successors, or any claiming under them, or any patentee or grantee of the crown, or any lord or lords of any manor or manors, or other person whomsoever, of or in relation to any right which they or any of them have or may have or lawfully claim to any wreck or wrecks, or any goods which are or shall be *flotsam*, *jetsam*, or *lagan*, but that such respective rights shall be enjoyed in as full, ample, and beneficial a manner, in every respect, as if this act had never been made.

Rights of the crown, &c. reserved.

XV. And be it further enacted by the authority aforesaid, that the officer of the customs who shall act in the preserving of any ship or vessel in distress, or the cargo thereof, shall, as soon as conveniently may be, cause or procure all persons belonging to the said ship or vessel, and others who can give any account thereof, or of the cargo thereof, to be examined upon oath before some justice of the peace, as to the name or description of the said ship or vessel, and the names of the master, commander, or chief officer and owners thereof, and of the owners of the said cargo, and of the ports or places from or to which the said ship or vessel was bound, and the occasion of the said ship's distress; which examination the said justices are hereby required to take down in writing, and they shall deliver a true copy thereof, together with a copy of the said account of the goods, to the said officer of the customs, who shall forthwith transmit the same to the secretary of the Admiralty for the time being, who shall publish or cause to be published in the next *London Gazette*, so much thereof as shall or may be necessary for the information of the persons interested or concerned therein.

Examination on oath to be taken of the ship's name, cargo and owners, &c.

and a copy to be transmitted to the secretary of the admiralty, and published in the Gazette.

XVI. And be it further enacted by the authority aforesaid, that the before-mentioned act of parliament, made in the twelfth year of her said late Majesty Queen Anne; and also, an act made in the fourth year of the reign of his late Majesty King George the First, for enforcing and making perpetual the before-mentioned act, and for inflicting the punishment of death on such as shall wilfully burn or destroy ships, shall in all things remain in full force, save only so far as the same are altered or changed by this present act.

The acts 12 Ann. stat. 2, c. 18, and 4 Geo. 1, c. 12, to be in force where not altered by this act.

XVII. And be it further enacted by the authority aforesaid, that this act shall take place from the twenty-ninth day of September, in the year of our Lord one thousand seven hundred and fifty-three.

Commencement of this act.

XVIII. Provided, that nothing in this act contained shall extend, or be construed to extend, to that part of Great Britain called Scotland.

Not to extend to Scotland.

6 Geo. 4, c. 107.

XLVII. It shall be lawful for the owner or salvor of any property liable to the payment of duty saved from sea, and in respect of which

any sum shall have been awarded under any law at the time in force, or in respect of which any sum shall have been paid, or agreed to be paid by the owner thereof, or his agent, to the salvors to defray the salvage of the same, to sell so much of the property so saved as will be sufficient to defray the salvage so awarded, or such other sum so paid or agreed to be paid; and that upon the production of an award made in execution of any such law to the commissioners of his Majesty's Customs, or upon proof to the satisfaction of the said commissioners that such sum of money has been paid, or has been agreed to be paid, the said commissioners are hereby empowered and required to allow the sale of such property aforesaid, free from the payment of all duties, to the amount of such sum so awarded, paid, or agreed to be paid, or to the amount of such other sum as to the said commissioners shall seem just and reasonable: provided always, that if such owner or salvor shall be dissatisfied with any determination of the said commissioners as to the amount of such property to be sold duty free, it shall be lawful for such owner or salvor to refer any such determination of the said commissioners to the judgment and revision of the High Court of Admiralty, and in that case such sale shall be suspended until the decision of such court shall have been had thereon.

XLVIII. All foreign goods, derelict, jetsam, flotsam and wreck, brought or coming into the United Kingdom, or into the Isle of Man, shall at all times be subject to the same duties, as goods of the like kind imported into the United Kingdom respectively are subject to; and if any person shall have possession of any such goods, either on land, or within any port in the United Kingdom, and shall not give notice thereof to the proper officer of the customs within twenty-four hours after such possession, or shall not on demand pay the duties due thereon, or deliver the same into the custody of the proper officer of the customs, such person shall forfeit the sum of one hundred pounds; and if any person shall remove or alter, in quantity or quality, any such liquors or tobacco, or shall open or alter any package containing any such liquors or tobacco, or shall cause any such act to be done, or assist therein, before such liquors or tobacco shall be deposited in a warehouse, in the custody of the officers of the customs, every such person shall forfeit the sum of one hundred pounds; and in default of the payment of the duties on such liquors or tobacco, within eighteen months from the time when the same were so deposited, the same may be sold in like manner, and for the like purposes, as goods imported may in such default be sold: provided always, that any lord of the manor having by law just claims to such liquors or tobacco, or if there be no such lord of the manor, then the person having possession of the same shall be at liberty to retain the same in his own custody, giving bond, with two sufficient sureties, to be approved by the proper officer of the customs, in treble the value of such goods, for the payment of the duties thereon at the end of one year and one day, or to deliver such goods to the proper officer of the customs, in the same state and condition as the same were in at the time of taking possession thereof.

1 & 2 Geo. 4, c. 75.

An act to continue and amend certain Acts for preventing Frauds and Depredations committed on Merchants, Shipowners, and Underwriters, by Boatmen and others; and also for remedying certain defects relative to the Adjustment of Salvage in England, under an Act made in the Twelfth Year of Queen Anne.

WHEREAS by an act passed in the forty-ninth year of his late Majesty King George the Third, intituled, "An Act for preventing 49 Geo. 3, c. 122.
frauds and depredations on merchants, shipowners, and underwriters, by boatmen and others; and also, for remedying certain defects relative to the adjustment of salvage in England, under an act made in the twelfth year of Queen Anne; which act was to continue in force for seven years, and from thence to the end of the next session of Parliament; and whereas by an act, passed in the fifty-third year of his late Majesty King George the Third, the said above recited act (except so far as the same was altered and extended), was further continued in force for seven years from the passing of the said act, and from thence to the end of the next session of parliament, and no longer; and whereas it is fit and expedient that the said above recited acts should be further continued, except so far as the same are altered by this act: be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons in this present parliament assembled, and by the authority of the same, that all pilots, boatmen, hovellers, or other persons, who shall take up any anchors, cables, tackle, apparel, furniture, stores or materials, or any goods or merchandize which may have been parted with, cut from, or left by any ship or vessel within any harbours, rivers or bays, or on any of the coasts of this kingdom, whether the same ship or vessel shall be or shall have been in distress or otherwise, and which shall have been weighed, swept for, or taken possession of by any such boatman, pilot, hoveller, or other person, shall send a report in writing of the articles so found, and stating the marks, if any, thereon, and also an accurate and particular description of the bearings, distances, and situations, and time when and where the same were so found, to a deputy vice-admiral, or his agent, at or near to the port or place where such boatman, pilot, hoveller, or other person, shall first arrive with such articles, within forty-eight hours after his or their arrival at such port or place, or before he or they shall leave the port, if he or they shall quit it before that time shall expire; and shall also, within such period as aforesaid, deliver such articles so found into a proper warehouse, or such other place as the vice-admiral of each county shall appoint for safe custody, until the same shall be claimed by the owner or owners thereof, or his, her, or their agent or agents, and the salvage, together with such other charges and expenses as are hereinafter directed to be paid in respect of such articles, paid by him or them, or security given for the payment thereof, to the satisfaction of the salvor or salvors thereof; and every such pilot, Concealing

Pilots and others to deposit anchors, cables, and other ships materials, taken possession of by them, in the places to be appointed by this act.

such articles forfeits claim to salvage, and subjects the offender to punishment.

Deputy vice admiral to send report of goods deposited to the Trinity House.

No report made until the articles amount to 20*l*.

Deputy vice admiral may seize goods not reported, and deposited, and shall make report thereof to the Trinity House, on penalty of 20*l*. and double value of the seizure.

One-third of value of goods allowed on being claimed by the owner.

Mode of ascertaining the

boatman, hoveller, or other person, who shall wilfully and fraudulently keep possession of, or retain, or conceal, or secrete any anchors or cables, tackle, apparel, furniture, stores, or materials, or any goods or merchandize, or deface, take out, or obliterate the marks and numbers thereon, or alter the same in any manner, with intent thereby, directly or indirectly, to prevent the discovery and identification of such articles so found, weighed, swept for, or taken possession of as aforesaid, and shall not report and deliver the same at some proper warehouse or other place in the manner aforesaid, and within the time hereinbefore limited, shall forfeit all claim to salvage, and shall, on conviction, be adjudged and deemed guilty of receiving goods knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore.

II. And be it further enacted, that every deputy vice-admiral, or his agent, to whom any such report shall be sent, shall within two days forward the same, or a true copy thereof, to the secretary of the corporation of the Trinity House of Deptford Strond, in London, and the same shall be placed by the said secretary in some conspicuous situation, for the inspection of all persons choosing to inspect and examine the same: provided always, that no report shall be forwarded by such deputy vice-admiral, or his agent, to the said corporation of the Trinity House of Deptford Strond, until the articles so to be deposited as aforesaid, for and in respect of which a report is required to be made, as hereinbefore is directed, shall amount in value to the sum of twenty pounds.

III. And be it further enacted, that it shall be lawful for any deputy vice-admiral, or his agent, to seize and detain any such articles as shall not have been reported in the manner hereinbefore directed: and upon such seizure such deputy vice-admiral, or his agent, shall deposit the same in the warehouse or other place to be appointed as aforesaid, and shall within two days thereafter send a report in writing of the articles as seized, and stating the marks (if any) thereon to the said corporation of the Trinity House of Deptford Strond, as before directed, to be made public as aforesaid; and every such deputy vice-admiral, or his agent, so seizing, who shall not make such report as aforesaid within two days after seizure as aforesaid, shall, on conviction before any justice of the peace or magistrate, upon the oath of one credible witness, or on the confession of the party offending, forfeit and pay the sum of twenty pounds for every such neglect, together with double the value of the goods so seized, one-half of which penalty shall be paid to the informer, and the other half to the poor of the parish or township where such offence shall be committed; and every deputy vice-admiral, or his agent, who shall make any such seizure, without any previous information being given to such deputy vice-admiral, or his agent, shall, on the same articles being claimed by, and delivered to the owner thereof, or his or her agent, be entitled to receive such sum of money as shall be equal to one-third part of the value thereof, after the payment of the duties, and any charges incidental to the recovery and preservation of the same.

IV. Provided always, and be it further enacted, that if the owner and deputy vice-admiral, or agent, so seizing cannot agree on the

value of the articles, such value shall be ascertained in like manner as is hereinafter directed with regard to salvage, or be referred to the decision of the High Court of Admiralty. value of articles seized.

V. Provided also, and be it further enacted, that if any such seizure shall have been made in consequence of any information given to any such deputy vice-admiral, or his agent, the deputy vice-admiral, or his agent, so seizing, shall only be entitled to receive from the owners or their agents of the articles one-sixth part of the value thereof, and one other one-sixth of such value shall be paid to the person who shall have given the information, the value of such articles to be ascertained in manner aforesaid. If deputy vice-admiral seize by previous information, he and informer to divide two-sixth parts.

VI. And be it further enacted, that if any such articles, so reported and delivered into the warehouse or other place as aforesaid, shall not be claimed within a year and a day after such report shall have been transmitted to the said corporation of the Trinity House of Deptford Strond, as before mentioned, the same shall be sold, and a certificate of such sale shall be delivered to the purchaser thereof, under the direction of the High Court of Admiralty, and the monies arising from the sale thereof be applied in the manner directed in and by an act passed in the twelfth year of the reign of her late Majesty Queen Anne, intituled, "An Act for Preserving all such Ships and Goods thereof which shall happen to be found on Shore, or Stranded on the Coasts of this Kingdom, or any other of her Majesty's Dominions;" and if the same shall have been seized by the deputy vice-admiral, or his agent as aforesaid, then the deputy vice-admiral, or agent, so seizing, and the person who shall have given such information as shall have led to the seizure (if any such information shall have been given), shall be equally entitled to the salvage which shall be allowed by the High Court of Admiralty to the salvors in the case of unclaimed property. If articles not claimed within a limited time, to be sold according to 12 Anne, c. 18, and if they shall have been seized, the deputy vice-admiral seizing and the person informing shall be equally entitled to salvage.

VII. And be it further enacted, that if the salvors of any such articles, or any goods so found, weighed, swept for, or taken possession of as aforesaid, and so lodged and reported as aforesaid, and the owner or owners thereof, or his, her, or their agent or agents, cannot agree respecting the amount of salvage to be paid for or in respect of the same, or the value thereof, as the case may be, then the matter in difference shall be determined by any three justices of the peace residing near to the place where such articles or goods shall be deposited, shall begin to proceed in their inquiry, as to such matters in dispute, within forty-eight hours after such difference shall be referred to them for their determination thereof; and if they cannot agree respecting the same, then it shall be lawful for them to nominate any third person conversant in maritime affairs, at their option, who shall ascertain the amount of the salvage to be paid, or the value thereof, as the case may be, within forty-eight hours after he shall have been so nominated as aforesaid; and the said justices, and such third person so nominated as aforesaid, shall have full power and authority, whenever they see occasion, to examine the parties, or their witnesses, upon oath, which oath they are hereby authorized to administer. If the owners and salvors cannot agree respecting the salvage, three justices shall determine the difference.

VIII. And be it further enacted, that it shall also be lawful for the said justices to decide, in the like manner, and within the same If the justices cannot agree, they shall nominate a person conversant in maritime affairs, who shall determine.
Justices may in like manner

determine upon remuneration to be made for services rendered to ships in distress or otherwise.

Decision of justices final, unless an appeal to Court of Admiralty.

Persons dissatisfied may appeal to the High Court of Admiralty; but the goods to be restored to the owners on giving bail.

Bail to be taken by a commissioner in prize cases, if there is one in the place, otherwise by a justice.

time as is hereinbefore directed with regard to salvage, on all claims and demands whatsoever, which shall or may be made by pilots, boatmen, and other persons, for service of any description (except pilotage) to be rendered by them to any ship or vessel, as well for carrying off from the shore to such ship or vessel any anchors, cables, or other stores from any port or ports of the coast of England and Wales, and Berwick-upon-Tweed, or for the saving and preserving any goods or merchandize which may have been wrecked, stranded, or cast away from any ship or vessel, or for being instrumental in saving the life or lives of any person or persons on board the said ship or vessel, the master, owner, or owners of such ship or vessel, or his, her, or their agent or agents, being present with such justices; and that the said justices shall have full power and authority to hear and determine on all cases whatever, of services rendered by pilots, boatmen, and others, to ships or vessels (except pilotage), whether such ships or vessels shall at the time be in distress or not, and that they shall have the like power of examining the parties or their witnesses upon oath, as last hereinbefore directed; and the decision of such justices shall be final and conclusive on all parties, save and except in such cases in which an appeal shall be interposed by either party to the High Court of Admiralty, such appeal to be interposed within thirty days after the award of the justices or such person so appointed as aforesaid.

IX. And be it further enacted, that in case the party or parties so claiming to be entitled to salvage, or the party or parties who is or are to pay the same, or their agents, shall be dissatisfied with such award and decision of the justices, or of the person so to be nominated by them as aforesaid, it shall be lawful for either of them respectively, within ten days after such award is made, but not afterwards, to declare to the justices, or such other person to be nominated by them as aforesaid, his, her, or their desire of obtaining the judgment of the High Court of Admiralty respecting the said salvage, and thereupon he, she, or they shall proceed, by taking out a monition within thirty days from the date of the said award; but in such case the said justices are hereby required and empowered to deliver to the owners and proprietors, or their agents, any such anchor or cable, goods, or other articles, respecting which any claim for salvage shall be made upon the owners or proprietors thereof, his, her, or their agent, giving full and sufficient bail in the amount of the sum awarded for salvage or compensation, and which bail shall be taken by a commissioner for taking examinations in prize cases, if there shall be one in the port or place where such difference shall arise; but if there shall be no such commissioner there, then the said justices, to whom such difference shall have been referred, or either of them, or any other of his Majesty's justices of the peace, are and is hereby authorized to take the same; and the commissioner or justice who shall take such bail, shall certify the same according to the form contained in the Schedule hereunto annexed, and transmit the same without delay to the High Court of Admiralty, together with a true certificate in writing, of the gross value of the whole of the articles respecting which salvage shall be claimed, and also a copy of such proceedings and awards, on unstamped paper, certified under the

hand of such commissioner or justice taking the bail, as aforesaid ; and the same shall be admitted by such Court of Admiralty as evidence in the cause.

X. And be it further enacted, that it shall and may be lawful for the person so to be named by the said justices as aforesaid, who shall decide on the amount of salvage to be paid, or on the value of the articles, or on the remuneration to be made to persons rendering assistance to ships or vessels, or persons as aforesaid, to demand and receive of and from the owner or owners of the articles saved, or of the ships or vessels in behalf of which the services may have been rendered, or his, her, or their agents or agent, a sum of money not exceeding two pounds two shillings, and such owner or owners, or his, her, or their agent, or agents, shall and is and are hereby required to pay to the person so to be nominated by the said justices nominated as aforesaid, such fee or reward, immediately after he shall have made his award or decision, and on delivery of the same.

Persons named by justices to decide on the amount of salvage, &c. may demand from the owner 2l. 2s.

XI. And be it further enacted, that if any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal, any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable, belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or in mitigation of such punishment to be imprisoned for any number of years, at the discretion of the Court in which the conviction shall be made.

Persons cutting away or defacing buoy ropes, &c. to be deemed guilty of felony, &c.

XII. And be it further enacted, that if any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandize which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions hereinbefore contained, with regard to such articles, shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanour at the common law, or be liable to be transported for seven years, at the discretion of the court before which he, she, or they shall be tried.

Persons fraudulently purchasing or receiving anchors, cables, &c. shall be considered receivers of stolen goods.

XIII. And be it further enacted, that in case the master, mate, or crew of any ship or vessel bound to parts beyond the seas, shall find and take on board of such ship or vessel, any anchor, cable, or any goods or merchandize, or shall receive any anchor, cable, or any goods or merchandize on board of such ship or vessel, from any other person or persons who may have found the same, knowing the same to have been so found, the master, mate, or other person,

Masters of ships bound to parts beyond the seas, finding or taking on board anchors and other articles,

to make entry in the log-book and report the same to the Trinity House, and on their arrival in England deposit the articles.

If not claimed to be sold.

Penalty for making default, not exceeding 100*l.* nor less than 30*l.*

Application of penalty.

20 Geo. 2, c. 28.

Fees to be paid for reports.
1*l.* 1*s.* to the deputy vice-admiral, and 1*l.* 1*s.* to the secretary of the Trinity House.

having the command of such ship or vessel, shall make a true entry in the log-book of such ship, of the description of the articles so found or taken on board as aforesaid, stating the marks (if any) thereon, and the bearings and distances, and other minute description, and the time when and where the same were found and taken on board; and also shall, at the first possible opportunity, transmit a report in writing, containing a true copy of such entry in the log-book of the said ship or vessel, to the said corporation of the Trinity House of Deptford Strond, and on the return of such vessel to any port in England or Wales, or Berwick-upon-Tweed, he shall deliver the same articles into the possession of a deputy vice-admiral, or his agent, in or nearest to such port at which he shall first arrive, and within twenty-four hours after his arrival, with the like report as is hereinbefore directed; and such deputy vice-admiral, or agent, is hereby required to transmit such report to the said corporation of the Trinity House at Deptford Strond, to be placed by the said corporation for inspection in like manner as aforesaid; and if the same shall not be claimed by the owner or owners thereof, or his, her, or their agent, within a year and a day after such report shall be transmitted, the same shall be sold and disposed of according to law with regard to unclaimed property; and in default thereof, or if the master of such ship or vessel shall sell or dispose of such anchor, cable, goods, or merchandize, to any person or persons whomsoever, or shall not, upon his first return to any port within England and Wales, or Berwick-upon-Tweed, report and deliver the same according to the provisions of this act, he shall for every such offence forfeit all claim to salvage, and on being thereof lawfully convicted before any justice of the peace or magistrate, on the oath of one credible witness, or on the confession of the party offending, forfeit and pay any sum not exceeding one hundred pounds, nor less than thirty pounds, one-half of which penalty shall be paid to the informer, and the other half to the president and governors, for the relief and support of such maimed and disabled seamen, and of the widows and children of such as shall be killed, slain, or drowned in the merchants service, under an act of Parliament made in the twentieth year of the reign of his late Majesty king George the Second, intituled, "An Act for the Relief and Support of Maimed and Disabled Seamen, and the Widows and Children of such as shall be Killed, Slain, or Drowned in the Merchants Service;" and shall also forfeit and pay double the value of such articles to the owners or owner thereof.

XIV. And be it further enacted, that it shall and may be lawful for the deputy vice-admiral, or his agent, who shall make the report required by this act to the said corporation of the Trinity House of Deptford Strond as aforesaid, to receive of and from the owner or owners of the articles in respect of which the report shall be made, or if the same are not claimed, then out of the produce of the sale thereof, the sum of one pound one shilling for each report; and that it shall also be lawful for the secretary or other proper officer of the said corporation of the Trinity House of Deptford Strond, to receive in like manner as last mentioned, the sum of one pound one shilling for each report so to be received by the said corporation, to be

made public by them as aforesaid, which last-mentioned sum shall be paid to the said deputy vice-admiral, or his agent, before the delivery of the goods, and accounted for by him to the Trinity House.

XV. And whereas pilots, hovellers, boatmen and other persons in small vessels, have for many years conveyed anchors and cables which may have been weighed, swept for, or taken possession of by them as aforesaid, or which they may have purchased of other persons, knowing them to have been weighed, swept for, or taken possession of, without being reported as aforesaid, to foreign countries, and there sold and disposed of, to the manifest injury and loss of the owners thereof; for remedying whereof be it further enacted, That every pilot, hoveller, boatman, or the master of any such vessel, who shall convey any such anchor or cable to any foreign port, harbour, creek, or bay, and there sell and dispose of the same, shall be deemed and adjudged guilty of felony, and shall be transported for any term not exceeding seven years.

Punishing pilots and others selling or disposing of anchors or cables in foreign countries.

XVI. And be it further enacted, That all persons who shall trade or deal in buying and selling anchors, cables, sails, or old junk, old iron, or marine stores of any kind or description, shall have their names, with the words "Dealer in marine stores," painted distinctly in letters of not less than six inches in length, upon the front of all their storehouses, warehouses, and other deposits for such goods; and in default of their so doing, they shall, on conviction before any justice or justices of the peace, or magistrate or magistrates of any jurisdiction where such storehouse, warehouse, and depôt shall be, upon the oath of one credible witness, or on confession of the party offending, forfeit and pay a sum not exceeding twenty pounds, nor less than ten pounds, one-half of which penalty shall be paid to the informer, and the other half to the poor of the parish or township where such offence shall be committed; and that it shall not be lawful for such dealers or traders to cut up any cable, or any part of a cable, exceeding five fathoms in length, or uncant, untwine, or unlay the same into junk or paper stuff on any pretence whatsoever, without first obtaining a permit from some justice of the peace or magistrate residing near to the residence of such dealer, which permit shall not be granted, unless an affidavit shall have been made that the cable so intended to be cut up had been *bond fide* purchased, and without fraud, by the party so intending to cut up the same, and without any knowledge or suspicion on his or her part, that the same had been or were dishonestly come by; and in which affidavit shall also be specified the particular quality and description of such cable, and the name or names of the seller or sellers thereof, which affidavit shall be recited and set forth at length in the permit thereupon granted, on pain of forfeiting for the first offence any sum not exceeding twenty pounds, nor less than ten pounds; and for every second or further offence, any sum not exceeding fifty pounds, nor less than twenty pounds, to be recovered before any justice of the peace: and one-half thereof to go the informer, and the other half to the poor of the parish in which such offence shall have been committed.

Penalty on dealers in marine stores not having their names painted on their storehouses, or cutting up any cable without a permit from a magistrate.

XVII. And be it further enacted, That for the more effectual Dealers to keep

an account of
old stores
bought by
them ;

to advertise
before cutting
up of cordage.

Persons may
demand inspec-
tion of books.

Penalty on
refusing in-
spection, &c.

Recovery of
penalties.

prevention of such frauds, all dealers in such marine stores as aforesaid, shall keep a book or books, fairly written, in which entries shall be from time to time regularly made, of all such old marine stores as shall be by them from time to time bought, containing a true account and description of the times when the same were so respectively bought by them, and of the names and places of abode of the respective sellers thereof; and before any person who shall obtain such permit for the cutting up of any such cable (as hereinbefore required to be obtained), shall proceed to cut up the same by virtue thereof, there shall be published, by the space of one week at least before the cutting up the same, one or more advertisement or advertisements in some public newspaper printed nearest to the storehouse, warehouse, or depôt where the articles shall be deposited, notifying that such party had obtained such permit, for the purpose of cutting up such cable, and of such kind and quality as therein described, and also specifying the place where such articles shall be deposited; whereupon it shall be lawful for all and every person or persons who may have just cause to suspect that such articles are the property of such person or persons, and shall have verified upon oath the fact of such his or their suspicion before any justice of the peace, or magistrate residing near to the said storehouse, warehouse, or depôt, by warrant for that purpose thereupon granted, to require of and from such dealer, who shall have so advertised, and shall be so sworn to be suspected as aforesaid, the production and examination of the book or books of entries hereby required by him or her to be kept, and inspect and examine the cables described in such permit; and in case any such dealer, when so thereunto required as aforesaid, shall neglect or refuse to produce to the person named in such warrant, as the person on whose oath the same shall have been obtained, the book or books containing the entries of such dealer so required to be made therein as aforesaid, or shall neglect to keep any such book or books in which entries, containing accounts of the several particulars hereinbefore required to be entered, shall be made, or to permit such inspection or examination as aforesaid, or shall, after obtaining such permit for the cutting up of any such cable, and before the cutting up of the same, neglect to publish such one or more advertisement or advertisements relative thereto, as is hereinbefore directed and required, the dealer or dealers so offending in all or any of the particulars hereinbefore mentioned, shall forfeit and pay for every such offence, being his, her or their first offence, any sum not exceeding twenty pounds nor less than ten pounds, and for every second or further offence, any sum not exceeding fifty pounds nor less than twenty pounds, one-half of which penalty shall on conviction before any justice of the peace or magistrate residing near as aforesaid, be paid to the informer, and the other half to the poor of the parish or township in which such offences shall be committed; and in case any of the penalties by this act imposed shall not be paid, with the charges incident to the conviction, immediately upon such conviction, the same shall and may be levied by warrant under the hand and seal of such justice of the peace or magistrate, upon the goods and chattels of any such offender or offenders; and in case no sufficient distress shall be found, then every such offender or offenders shall

and may be committed by any justice of the peace or magistrate as aforesaid to gaol, in case of any first offence, for the space of six calendar months, and in case of any second or further offence, for the space of twelve calendar months, unless the said penalty and the charges shall be sooner paid.

XVIII. And be it further enacted, That all manufacturers of anchors and kedge anchors, shall place his, her or their name or names, together with a progressive number, and also the weight of the anchor, in legible characters upon the crown, and also upon the shank under the stock of each anchor, which he, she or they shall manufacture; and shall also place his, her or their name or names, together with a number, and also the weight of the kedge anchor upon the crown, and also upon the shank near to the stock of every kedge anchor, which he, she or they shall manufacture; and in case any such manufacturer shall neglect to place such name, number, or weight in the manner hereinbefore directed and required, every such person or persons so offending shall, on conviction before any justice of the peace or magistrate, on the oath of one credible witness, or on the confession of the party so offending, forfeit and pay, any sum not exceeding five pounds, nor less than forty shillings, one-half of which penalty shall be paid to the informer, and the other half to the poor of the parish or township in which such offence shall be committed.

Manufacturers of anchors to place marks on anchors and kedge anchors.

Penalty on neglect.

XIX. And for the more easy and speedy conviction of offenders against this act, be it further enacted, That all and every justice or justices of the the peace before whom any person shall be convicted of any offence against this act, shall and may cause the conviction to be drawn up according to the following form; *videlicet*,

Form of conviction.

“Be it remembered, That on the _____ day of _____ in the year of our Lord _____
A. B. is convicted before me [*or us*], one [*or two, as the case may be*] of his Majesty's justices of the peace for the _____ [*here specify the offence, and the time and place when and where committed as the case may be,*] contrary to an act passed in the second year of the reign of king George the Fourth, intituled, [*here insert the title of this act*]. Given under my hand and seal [*or, our hand and seals*] the day and year first above written.”

And no certiorari, or other writ or process for the removal of any such conviction or any proceedings thereon, into any of his Majesty's courts of record at Westminster, shall be allowed or granted.

XX. And be it further enacted, That it shall and may be lawful to and for any person or persons so convicted by any justice or justices of the peace before mentioned, of any offence or offences against this act, within three calendar months next after such conviction, to appeal to the justices of the peace assembled at the general quarter-sessions holden for the county, city, or place where the matter of appeal shall arise, first giving ten days' notice of such appeal to the person or persons appealed against, and of the matter thereof, and entering into a recognizance before some justice of the peace for such county, city, or place, with two sufficient sureties, conditioned to try such

Appeal from conviction to the general quarter sessions.

appeal, and for abiding the determination of the court therein ; and such justices at the general quarter-sessions shall, upon due proof of such notice having been given and recognizance entered into, hear and determine the matter of such appeal, and may either confirm or quash and annul the said conviction, and award such costs to either party as to them shall seem just and reasonable, and the decision of the said justices therein shall be final, binding and conclusive ; and no proceeding to be had or taken in pursuance of this act shall be quashed or vacated for want of form only, or be removed by certiorari, or any other writ or process whatsoever, into any of his Majesty's courts of record at Westminster or elsewhere ; any law or statute to the contrary thereof in anywise notwithstanding.

Inhabitants
may be compe-
tent witnesses.

XXI. Provided always, and be it further enacted, That the inhabitants of any parish, township, or place, shall be deemed and taken to be competent witnesses, for the purpose of proving the commission of any offence against this act, within the limits of such parish, township, or place, notwithstanding the penalty incurred by such offence, or any part thereof, is or may be given or applicable to the poor of such parish, township, or place, or otherwise, for the benefit or use, or in aid or in exoneration of such parish, township, or place.

Offences may
be tried in the
county where
articles found,
or if sold in
foreign parts,
where offenders
reside.

XXII. And be it further enacted, That all felonies, misdemeanors, and other offences under this act, shall and may be laid to be committed, and shall be tried in any city or county (being a county) where any such article, matter or thing, in relation to which such offence shall have been committed, shall have been found in the possession of the person committing the offence ; or if the same shall have been sold in foreign parts, then in the county or place in which the person selling the same shall reside.

Act not to
alter the statute
of 48 Geo. 3,
c. 130.

XXIII. Provided always, and be it further enacted, That nothing in this act contained shall extend or be construed to extend to or be in force within the limits specified and directed in an act passed in the forty-eighth year of the reign of his late Majesty, intituled, "An Act for preventing the various Frauds and Depredations committed on Merchants, Ship Owners and Underwriters, by Boatmen and others, within the jurisdiction of the Cinque Ports ; and also for remedying certain defects relative to the Adjustment of Salvage under a Statute made in the twelfth year of the reign of her late Majesty Queen Anne," or in any manner to affect any of the provisions of the said act, but the said recited act shall remain in full force within the limits therein specified, as if this act had not been passed : provided also, that nothing in this act contained shall extend or be construed to extend to repeal, take away, or alter any of the clauses, powers, or provisions contained in an act of parliament made in the forty-eighth year of the reign of his late Majesty, intituled, "An Act for the better regulation of Pilots, and of the Pilotage of Ships and Vessels navigating the British Seas ;" but that the said act shall remain in full force as if this act had not been passed.

Reservation of
the statute of
48 Geo. 3, c.
104.

Reservation of
the rights of
the High Court
of Admiralty,
&c.

XXIV. Provided also, and it is hereby further declared, That this act, or any thing herein contained, shall not extend or be construed to extend to the taking away, abridging, prejudicing or impeaching, in any manner whatever, the jurisdiction of the High Court of Ad-

miralty of England, or the jurisdiction of the Admiralty Court of the Cinque Ports, two ancient towns, and their members, or of the Admiralty Court of the borough of Great Yarmouth, in the county of Norfolk, or of the Admiralty Court of the borough of Dunwich, in the county of Suffolk, or of the Admiralty Court of the borough of Southampton, in the county of Hants, or of the Admiralty Court of the borough of Southwold, in the county of Suffolk, or of the Admiralty Court of the borough of Lynn Regis, in the county of Norfolk ; but that it shall and may be lawful for the said courts respectively, and the judge or judges thereof for the time being, to have, use, exercise, and enjoy jurisdiction over all such matters, rights and offences, as they have heretofore had, used, exercised and enjoyed, as fully and effectually, to all intents and purposes whatever, as if this act had not been made ; any thing herein contained to the contrary thereof in anywise notwithstanding.

XXV. Provided also, and it is hereby enacted, That neither this act nor any thing herein contained shall any ways extend, or be construed to extend, to deprive or in any ways prejudice the rights of his Majesty, his heirs or successors, or any claiming under them, or any of them, or any patentee or grantee of the crown, or any lord or lords, or lady or ladies, of any manor or manors whatsoever ; but that such respective rights shall be enjoyed in as full, ample, and beneficial a manner, in every respect, as if this act had never been made.

Reservation of the rights of the crown, and of lords and ladies of manors.

XXVI. And be it further enacted, That no lord or lady of any manor, or other person who may be entitled to or claim to be entitled to wreck of the sea, or to any goods found jetsam, flotsam or lagan, shall be entitled to appropriate such wreck or goods to his, her or their own use, or otherwise to dispose thereof, until he, she or they shall have caused a report thereof in writing, to be given to the deputy vice-admiral of that part of the coast where the same shall have been stranded, wrecked or found, or to his agent ; or if there shall be no such deputy vice-admiral or agent residing within the distance of fifty miles, then to the Corporation of the Trinity House of Deptford Strond ; which report shall contain an accurate and particular description of the wreck or goods found, and of the place or places and time or times where and when the same may have been found, and of any marks that may be thereon, and of such other particulars as may the better enable the owner or owners thereof to recover the same, and also of the place or places where the same are deposited and may be found and examined by any person claiming any right to such wreck or goods, nor until the full expiration of a year and a day after the delivery of such notice, any thing in any law to the contrary notwithstanding ; and the deputy vice-admiral or agent aforesaid shall, within forty-eight hours after receiving such report as aforesaid, transmit a copy thereof to the secretary of the Corporation of the Trinity House of Deptford Strond, upon pain of forfeiting for any neglect to transmit such account as aforesaid, the sum of fifty pounds to any person who will sue for the same ; and the said secretary shall cause such account to be placed in some conspicuous situation, for the inspection of all persons claiming to inspect and examine the same : provided always, that nothing herein contained shall extend or be construed to extend to repeal or in any manner to affect any of the provisions

Lords of manors not to lay claim to wrecks till report of the same be made to the deputy vice-admiral of the coast, &c.

Deputy vice-admiral to transmit a copy of report to the Secretary of the Trinity House. Penalty 50*l*.

52 Geo. 3, c.
159.

Perishable
goods may be
sold with con-
sent of a jus-
tice.

* c. 76.

Money to be
deposited in
the hands of
the lord of the
manor, &c.

An account of
sale to be
transmitted to
the deputy
vice-admiral.

Goods saved
from vessels
wrecked to be
forwarded to
the ports of
their original
destination.

of an act passed in the fifty-second year of his late Majesty, intituled, "An Act for charging Foreign Liquors and Tobacco, derelict, jetsam, flotsam, lagan or wreck, brought or coming into Great Britain, with the Duties payable on Importation of such Liquors and Tobacco."

XXVII. And be it further enacted, That when any goods which shall be found or taken possession of by any lord or lady of any manor, or person entitled or claiming to be entitled to wreck of the sea, or to goods found flotsam, jetsam, or lagan, or his or her agent or servant, or by any vice-admiral, or his deputy or agent, or by any officer or other person whatsoever acting by or under the authority of this act, or of all act passed in the present session of Parliament, intituled, "An Act to continue and amend certain Acts for preventing various Frauds and Depredations committed on Merchants, Ship-owners, and Underwriters, by Boatmen and others, within the Jurisdiction of the Cinque Ports," shall be of so perishable a nature, or so much injured or damaged, that the same cannot be kept, then and in every such case such goods shall and may, at the request of any of the persons interested or concerned therein, or in the saving and preserving thereof, by and with the consent and approbation of some justice of the peace, not interested or concerned in the same, or in the saving and preserving thereof, and in the presence of such justice, or of some person for that purpose specially appointed by such justice, be sold by public auction or private contract, as such justice may direct by some writing under his hand, which writing shall contain an accurate and particular account of the goods, and of the marks that may be thereon, or other particulars belonging thereto, and of the times and places of the finding and intended sale thereof; and the money raised by such sale, after defraying the reasonable expenses of the sale, to be settled and allowed by such justice, shall be deposited and remain in the hands of the lord or lady of the manor, or other person, or deputy vice-admiral, who would have received the custody of the goods so sold, to abide and be subject and liable to the claims of all persons, in like manner as the goods themselves would be subject and liable if remaining unsold: provided always, that all persons required to transmit reports to the deputy vice-admiral of the finding of any goods, shall, in case of any such sale as last afore-said, likewise transmit to such deputy vice-admiral an account of such sale, and of the proceeds thereof; and the said deputy vice-admiral shall forward such reports to the secretary of the Trinity House of Deptford Strond, within the like periods, and under and subject to the like penalties and forfeitures for any neglect therein, as in cases of any goods found and required to be reported under the provisions of the said recited act and this act.

XXVIII. And be it further enacted, That it shall and may be lawful to and for the commissioners of Customs and Excise, and they are hereby required to permit all goods, wares and merchandize saved from any vessel or vessels stranded or wrecked on their respective homeward voyage, to be forwarded to the port or ports of their original destination; and also to permit goods, wares and merchandize saved from any vessel or vessels stranded or wrecked on their respective outward voyage, to be returned to the port or ports at which the same were shipped; but such commissioners are to take

security for the due protection of the revenue in respect of such goods, wares and merchandize.

XXIX. And be it further enacted, That it shall be lawful for the deputy vice-admiral of the part of the coast where any ship or vessel shall be stranded or wrecked, or where any wreck of the sea or goods shall be cast on shore, and for his agent, and also for the owner or master of any such ship or vessel, and for the owners of any such goods, or of any part thereof, and for any officer of the Customs or Excise, and other officer, and for all persons whatsoever employed or acting in aid of or in the assisting of any such deputy vice-admiral, officer, master, or owner as aforesaid, in the saving or recovering any such ship or vessel, or the cargo, stores, tackle, or other articles belonging to the same, or the preserving the lives of the crew or persons belonging thereto, or of any wreck as aforesaid, to pass and repass with their horses, carts, carriages or servants, over any lands near to the part of the sea-coast where such vessel shall be so wrecked or stranded, or on which such wreck shall be cast, without interruption or obstruction by the owner or occupier thereof, for the purpose of rendering assistance in saving, recovering and preserving any such ship or vessel, or goods or stores, or any cables, anchors, spars, masts, cordage, or other tackle or articles belonging to any ship or vessel, or for saving or otherwise assisting in preserving the lives of the crew, or of any persons on board of such ship or vessel, or for the taking possession of and securing for the benefit of the owners thereof, of any wreck or goods, or other things cast on shore, or found on shore, or found near thereto, provided there shall be no road by which the parties may pass and repass with as much convenience and expedition as over such lands : and also to place any planks, timber, or any part of the wreck, or any goods or stores removed or saved from any such ship or vessel, or any other wreck or goods as aforesaid, upon any such land for a reasonable time, until they can be removed to some warehouse or safe place of deposit, making compensation to the occupier of such lands for any damage done by the means aforesaid, which compensation shall be a charge upon the wreck or goods in respect whereof the damage may be done, in like manner as salvage ; and in case the parties cannot agree as to the amount thereof, then the same shall be ascertained and settled by two justices of the peace, or of a third person to be named by them, in such manner and within such times as the amount of salvage is directed to be ascertained and settled by the said recited act in the forty-ninth year of his said Majesty's reign.

XXX. And be it further enacted, That if any owner or occupier of any land or premises, over which any person is authorized by this act to pass and repass, for any of the purposes in this act before-mentioned, shall interrupt, impede or hinder any such person from passing over his land or premises, with horses, carts, carriages and servants, for the purposes in this act before-mentioned, or any or either of them, by locking his gates, or refusing upon request to open the same, or otherwise, or shall obstruct or hinder the placing any wreck, goods, stores, or other articles upon his land, or shall prevent their remaining there for a reasonable time, until the same can be removed to some warehouse or safe place of public deposit, such oc-

Carriages may pass over the lands near the coast where vessels are wrecked, for the preservation of the wreck, &c.

Compensation to the land occupiers.

If parties do not agree, two justices to settle it.

Penalty on refusing persons so employed from passing over lands, &c. 100/.

Questions of salvage within the jurisdiction of the High Court of Admiralty or the Courts of Record at Westminster.

In case of damage done by a foreign vessel in harbour, &c. any of the judges may cause the vessel to be arrested until the owners, &c. shall undertake to appear defendant in any action.

Penalties how recoverable.

c. 76.

Reservation of the rights of the Trinity Houses of Kingston upon Hull, Newcastle-upon-

cupier shall forfeit and pay to any person who will sue for the same, the sum of one hundred pounds, to be recovered by action of debt.

XXXI. And whereas questions have arisen as to the jurisdictions of the Courts of Record at Westminster, and of the High Court of Admiralty, in cases of salvage of ships and goods performed between high and low water mark; be it therefore enacted, that any question in relation to salvage of any ship or vessel, or of any goods, which shall be performed between high and low water mark, shall be and be deemed to be within the jurisdiction or cognizance of the High Court of Admiralty, or of his Majesty's Courts of Record at Westminster; any thing in any act or acts of parliament to the contrary notwithstanding.

XXXII. And be it further enacted, that in every case in which any damage shall be done by any foreign ship or vessel to any British ship or vessel, barge, boat, or other craft, or any buoy or beacon, in any harbour, port, river, or creek, and it shall appear on a summary application, made to any judge of any of his Majesty's Courts of Record at Westminster, or to the judge of the High Court of Admiralty respectively, that such damage or loss has probably been sustained or arisen by the misconduct or negligence of the master or mariners of such foreign ship or vessel, then and in such case it shall be lawful for such judge to cause such foreign ship or vessel, being in any harbour, port, river, or creek, to be arrested and detained, until the master, or owner, or consignee, or some agent of the owner, master, or consignee of such ship or vessel, shall undertake to appear and be defendant in any action which may be brought for such loss or damage, and give such sufficient security, by bail or otherwise, for all costs and damages, if recovered, as shall be directed and ordered by such judge, if it shall upon the trial of such action or suit appear that such loss or damage shall have arisen from such negligence or misconduct as aforesaid; and in such action or suit the person giving security shall be made defendant, and shall be stated to be the owner of the foreign ship or vessel doing such damage; and it shall not be necessary in any such action or suit to give any other evidence of the liability of such person to such action or suit, than the production of the order of the judge, made in relation to such security as aforesaid.

XXXIII. And be it further enacted, that all penalties and forfeitures above the sum of twenty pounds, or which by this act, or by an act passed in the present session of parliament, intituled "An act to continue and amend certain Acts for preventing the various Frauds and Depredations committed on Merchants, Shipowners, and Underwriters, by Boatmen and others, within the Jurisdiction of the Cinque Ports," or any or either of them, or by this act, are made to be recoverable by action or suit, shall and may be sued for and recovered in any of his Majesty's Courts of Record at Westminster.

XXXIV. Provided also, and it is hereby further enacted and declared, that this act, or any thing herein contained, shall not extend or be construed to extend to the taking away, abridging, hindering, prejudicing, or impeaching of any grant, liberties, franchises, and privileges heretofore granted to and vested in the corporation of the Trinity House of Kingston-upon-Hull, or in the com-

missioners acting under the provisions of any acts or acts of parliament relating to the adjustment of salvage for anchors, cables, and other ships materials found in the river Humber, or in the masters, wardens, and brethren of the Trinity Houses of Newcastle-upon-Tyne and Scarborough respectively; but that the said corporation, and the said masters, wardens, and brethren, shall hold and enjoy the same as fully and effectually, to all intents and purposes, as they might have done in case this act had never been made; any thing herein contained to the contrary thereof in anywise notwithstanding.

Tyne, and
Scarborough.

XXXV. Provided also, and it is hereby further enacted and declared, that nothing in this act shall extend, or be construed to extend, to prejudice or take away any right, property, authority, or jurisdiction of the mayor of the city of London, or of the mayor and commonalty and citizens of the city of London, to, in, and upon the rivers of Thames and Medway.

Reservation of
the rights of
the city of
London.

XXXVI. Provided also, and be it hereby further enacted, that nothing in this act contained shall extend, or be construed to extend, to those parts of the United Kingdom of Great Britain and Ireland called Scotland and Ireland.

This act not to
extend to
Scotland or
Ireland.

XXXVII. And whereas it is expedient that the like means of conclusively adjusting and recovering the quantum of the monies or gratuities to be paid to the said several persons acting or being employed in the salvage of any ship or vessel, or the materials or stores belonging thereto, or goods or persons on board thereof, should subsist, and be by law applicable in cases where the salvors shall have acted under and by the employment and authority of any magistrate, or of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, as are now by law provided for adjusting the quantum of such monies or gratuities, which shall have become due in cases where application shall have been first made to the officers of the customs, or other the officer or officers in that behalf named and appointed in and by a certain act made in the twelfth year of the reign of Queen Anne, intituled, "An act for preserving all such Ships and Goods thereof which shall happen to be forced on Shore, or stranded upon the Coasts of this Kingdom, or any other of her Majesty's Dominions," and where such assistance shall thereupon have been rendered, in pursuance of the provision of that statute; be it therefore enacted, that all and every the means which in virtue of the said last-mentioned act subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the quantum of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship or vessel, or the materials or stores belonging thereto, or goods, in cases where application shall have been first made pursuant to the said act, to officers of the customs, or other the officer or officers in that behalf mentioned, and assistance shall have been thereupon rendered and had, in pursuance of the provisions of the said act, shall be by law applicable and available, in like manner to all intents and purposes, in cases where the salvors shall have acted under and by the employment and authority of any magistrate, or of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any authority or assistance derived

For the better
adjustment and
payment of
salvage pursu-
ant to 12 Ann.
c. 18.

and submitting themselves to the jurisdiction of the High Court of Admiralty of England, bound themselves, their heirs, executors, and administrators, for the master and owners of the said goods and merchandize, in the sum of _____ of lawful money of Great Britain, unto the said _____ to answer such salvage and expenses, or the value of the goods [*as the case may be*] as shall be hereinafter decreed by the said court, according to the tenor of the act in that case made and provided; and unless they shall so do, they hereby consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wherever the same shall be found, to the value of the sum above mentioned.

This bill was duly taken, acknowledged, and received, at the time and place above written, before me the undersigned Commissioner; and I do believe and consider the persons above-mentioned sufficient security for the said sum of _____

—◆—
1 & 2 Geo. 4, c. 76.

An Act to continue and amend certain Acts for preventing the various Frauds and Depredations committed on Merchants, Shipowners, and Underwriters, by Boatmen and others, within the Jurisdiction of the Cinque Ports; and also for remedying certain Defects relative to the Adjustment of Salvage, under a Statute made in the twelfth Year of the Reign of her late Majesty Queen Anne.

WHEREAS by an act passed in the forty-eighth year of his late Majesty king George the Third, intituled, "An Act for preventing 48 Geo. 3, c. 130.
Frauds and Depredations committed on Merchants, Shipowners, and Underwriters, by Boatmen and others, within the Jurisdiction of the Cinque Ports; and also for remedying certain Defects relative to the Adjustment of Salvage, under a Statute made in the twelfth Year of her late Majesty Queen Anne;" which act was to continue in force for seven years, and from thence to the end of the next session of Parliament: and whereas by an act passed in the fifty-third year of his late Majesty king George the Third, the said above recited act, except so far as the same was altered, was further continued in force for seven years from the passing of the said act, and from thence to the end of the next session of Parliament, and no longer: and whereas it is expedient that the said recited acts should be further continued, except so far as the same are altered by this act; be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that it shall and may be lawful for the lord warden of the Cinque Ports for the time being to nominate and appoint, by any instrument or instruments under his hand and seal, three or more substantial persons in each of the Cinque Ports, two ancient Lord warden to appoint commissioners

to determine differences relative to salvage.

Commissioners to appoint a secretary or register, subject to the approbation of the lord warden.

Proceedings to be entered.

Power to commissioners to settle all differences which may arise.

Commissioners to be paid by the owners, &c. for their trouble, such

towns, and their members, to adjust and determine any difference relative to salvage (which may arise) between the master of any vessel and the person or persons bringing such cables and anchors ashore; and in case any ship or vessel shall be either forced or cut from her cables and anchors, by extremity of weather, or by any other accident whatever, and leave the same in any roadstead, or other place within the jurisdiction of the Cinque Ports, two ancient towns, and their members, and the salvage cannot be adjusted between the persons concerned, then the same shall be determined by any three or more of the said persons so to be appointed as aforesaid, within the space of twenty-four hours after such difference shall be referred to them for their determination thereof, any usage or custom to the contrary in anywise notwithstanding: provided always, that such commissioners shall, immediately after their nomination, proceed to elect some fit and proper person, who shall be a notary or master extraordinary in Chancery, as their secretary or register, except to the port of Dover, where the register for the time being of the Court of Admiralty of the Cinque Ports shall be the register; and which secretary, or register, shall enter in a book, to be kept for that purpose, all the proceedings of such commissioners, and also a copy of the awards which they shall from time to time make; but such election of secretaries, or registers, shall be subject to the approbation of the lord warden for the time being.

II. And be it further enacted, that it shall be lawful for the said commissioners to be appointed as aforesaid, to decide on all claims and demands whatever, which shall or may be made by pilots, hovellers, boatmen, and other persons, for services of any sort or description rendered to any ship or vessel, as well for carrying off from the shore to such ship or vessel, any anchors, cables, or other stores from any part or port of the coast of Kent, Sussex, Essex, or the Isle of Thanet, within the jurisdiction aforesaid, as for the conducting and conveying such ships and vessels from the Downs, and other bays and roadsteads on the coast of Kent, Sussex, and Essex, and the Island of Thanet, or from the sea or any other place, to Ramsgate, Dover, or any other harbour, port, or place, on the said coasts, within the jurisdiction aforesaid, or for the saving and preserving, within the jurisdiction aforesaid, any goods or merchandize wrecked, stranded, or cast away from any ship or vessel, the master or owners thereof, or their agents, being present at the place where the commissioners shall be sitting; and that the said commissioners shall have full power and authority to hear and determine on all cases whatever of services rendered by pilots, boatmen, and others, to shipping within the jurisdiction aforesaid, whether such ships or vessels shall be in distress or not; and that it shall be lawful for the said commissioners, whenever they see occasion, to examine the parties or their witnesses upon their oath, which oaths shall and may be administered by the said secretary or register.

III. And be it further enacted, that it shall be lawful for the commissioners so to be appointed, and their secretary or register as aforesaid, who shall decide on any such claims or demands as aforesaid, to demand and receive of and from the owners of such ships or

vessels, or the proprietors of any such goods or merchandizes, against whom any pilot, boatman, or other person, shall make any claim or demand for services of any sort rendered to such ships or vessels, or for the sole saving and preserving any goods or merchandizes wrecked, stranded, or cast away, within the jurisdiction aforesaid; and such owners and proprietors are hereby required to pay to them such fee or reward for deciding on every such claim and demand as shall be adjudged to them in that behalf by the lord warden of the Cinque Ports for the time being: provided always, that no person to be appointed a commissioner by virtue of this act, shall have power or authority to act in any other port or place than that in which he is resident, or from which his usual place of residence is not distant more than one mile; and that before such commissioner shall in any case proceed to act, they shall severally take the following oath before a magistrate or a commissioner of the Court of King's Bench or Common Pleas, or a master extraordinary in Chancery (*vide licet*:

fees as shall be allowed by the lord warden.

No commissioner shall act out of the place where he is resident.

Commissioners to take the following oath.

" I, A. B. do swear, that I have not, neither will I in any way, directly or indirectly, take or receive any fee, emolument, or reward, from any of the parties whose interests are referred to my decision (save and except such fee or reward as shall be allowed by the lord warden to be paid to me by the shipowners or proprietors of the cargo, or their agents); and that I will not accept or receive any fee whatever from the persons claiming reward or salvage; but that I will decide according to the best of my judgment, on the evidence to be brought before me, without favour or affection to either party.

Form of oath.

" So help me GOD."

IV. And be it further enacted, that in case the party or parties so claiming to be entitled to salvage or compensation for services rendered as aforesaid, or the party or parties who are to pay the same, or their agents, shall be dissatisfied with such award and decision of the commissioners, it shall and may be lawful for either of them respectively, within eight days after such award is made, but not afterwards, to declare to the commissioners his or their desire of obtaining the judgment of some competent Court of Admiralty respecting the said salvage or compensation as aforesaid, and thereupon such party or parties shall forthwith be required by the commissioners to declare whether he or they will proceed in the Court of Admiralty of the Cinque Ports, or the High Court of Admiralty of England, and he or they shall so proceed within twenty days from the date of such award, by taking out a monition against the adverse party; but in such case the said commissioners are hereby empowered and required to permit the said ship and her cargo, notwithstanding such declaration and proceeding, to depart on her voyage, or to deliver to the owners and proprietors, or their agents, any goods or merchandizes respecting which any claim for salvage shall be made upon the owners or proprietors of the same, or their agents, giving good and sufficient bail in double the amount of the sum awarded, and which bail the said commissioners, or any of them, are and is hereby authorized to take and certify according to the form contained in the Schedule hereunto annexed, and to transmit the same without delay to

Parties dissatisfied may appeal to the High Court of Admiralty, or the Admiralty of the Cinque Ports; but the ship to be liberated, on giving bail in double the amount of the award.

Bail to be taken and certified according to schedule annexed.

the Court of Admiralty, in which the intention of proceeding shall be so declared, together with a true certificate in writing of the gross value of the whole ship and cargo, or other goods and merchandizes respecting which salvage shall be claimed, and also an official copy of such proceedings and awards, certified by the said secretary or register, and the same shall be admitted by such Court of Admiralty as evidence in the cause.

The appeal to be conclusive.

V. Provided always, and be it further enacted, that on an appeal so as aforesaid being made to the Court of Admiralty of the Cinque Ports, or to the High Court of Admiralty, the same shall be taken and held to be final, and no ulterior appeal from sentence of the Court of Admiralty of the Cinque Ports, or from the High Court of Admiralty, shall lie to the king in Chancery.

Persons cutting away or defacing buoy ropes, &c. deemed guilty of felony.

VI. And be it further enacted, that if any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall do or commit any act with intent and design to cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark, belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, within the jurisdiction aforesaid, with intent thereby to defraud or injure any person or persons whatsoever, or body corporate, such person or persons so offending shall, on being convicted of such offence, be deemed and adjudged guilty of felony, and shall be liable to be transported for any period not exceeding fourteen years.

Anchors, &c. found within the jurisdiction, to be deposited in either of the places herein mentioned, &c. or the persons having them in possession shall be adjudged guilty of receiving stolen goods.

VII. And be it further enacted, that all anchors, cables, buoys, ropes, or other ships' stores or materials, or any goods or merchandizes of any sort or description whatever, which may have been parted with, cut from, or left by any ship or vessel in the Downs, or elsewhere, within the jurisdiction aforesaid, whether the same shall be in distress or otherwise, and which shall have been weighed, swept for, or taken possession of by any pilots, boatmen, hovellers, or other person or persons, shall be by them delivered either at Ramsgate, Deal, or Dover, Harwich, Brightlersea, or Wivenhoe, six public places of deposit declared by this act for the reception of all such articles, or such other places as shall be declared by the lord warden, in the same state in which they are found, to the serjeant or serjeants of the Admiralty of the Cinque Ports aforesaid, their deputy or deputies, or such other person as he shall authorize to receive the same; but if any such articles so found, weighed, swept for, or taken possession of, shall not be so delivered immediately, or duly reported to such serjeant or serjeants, or their deputies, on the finding thereof, and shall afterwards be discovered in the possession, custody, or power of such pilots, boatmen, hovellers, or other person or persons, he, she, or they shall, on conviction, be adjudged and deemed guilty of receiving goods knowing them to have been stolen, and shall suffer the like punishment as if the same had been stolen on shore.

All wrecked merchandize and ships' stores to be also deposited in like manner.

VIII. And be it further enacted, That all merchandize, materials of any sort, or marine stores of every description, whether belonging to his Majesty, or to any British subjects, or foreigners, which may be preserved from any ship or vessel stranded, deserted by her crew,

or wrecked, either on shore, or on the Goodwin or any other sand or shoal, or any part of the main land, or any port or place within the jurisdiction aforesaid, shall be landed and delivered at one of the six places of deposit, belonging to the lord warden's deputies at Ramsgate, or Deal, or Dover, Harwich, Brightlersea, or Wivenhoe, or such other place as shall be declared and appointed by the said lord warden for that purpose, which ever shall be most convenient or contiguous to the place where the loss occurs; and that if any person or persons, who shall have preserved or taken possession of any such merchandize or marine stores within the jurisdiction aforesaid, shall sell, dispose of, or otherwise make away with the same, or shall in any manner conceal, deface, take out, or obliterate the marks or numbers thereon, or alter the same in any manner, with intent thereby directly or indirectly to prevent the discovery and identity of such articles by the owner or owners thereof, such person or persons shall be deemed and adjudged guilty of felony.

If sold, or marks defaced by the salvors, they shall be adjudged guilty of felony.

IX. Provided always, and it is hereby enacted and declared, That nothing herein contained shall extend, or be construed to extend to the preventing or restraining the serjeant's deputies, or any other officer of the lord warden, from seizing all such anchors, cables, buoys, buoy ropes, or other ships' stores or materials as aforesaid, and likewise all such merchandize and marine stores as aforesaid, which he or they shall find concealed, or attempted to be concealed, within the jurisdiction aforesaid, or which he or they shall find in the possession of any person or persons who shall be conveying, or in the act of preparing to convey the same out of the said jurisdiction, or from any place where the same shall have been landed within the said jurisdiction, to any other place within the same, other than to one of the said public places of deposit aforesaid; but it shall be lawful in all such cases, for all and singular the officers aforesaid, to seize the same as well on shore as at sea, within the said jurisdiction, and to take and carry the same to one of the said public places of deposit; anything in this or in any other act, law, custom, or usage to the contrary notwithstanding.

Officers of the lord warden may seize anchors, stores, &c. concealed within their jurisdiction, &c.

X. And be it further enacted, That if any person or persons, within the jurisdiction aforesaid, shall knowingly and with intent to defraud and injure the true owner or owners thereof, purchase or receive any anchors, cables, ropes, or other ships' stores or materials of any description whatever, or any merchandize or lading which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck within the jurisdiction aforesaid, such person or persons shall on conviction thereof be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, and be also liable to be transported for seven years, in the discretion of the court before which he, she or they shall be tried.

Receivers to be subject to the same punishment as though the goods had been stolen on shore.

XI. And whereas it frequently happens, that anchors, cables, and other marine stores, or merchandize, which have been weighed, swept for, or taken possession of, within the jurisdiction aforesaid, are, for

Lord warden's officers authorized to seize

anchors, &c. taken up within the limits of the Cinque Ports, though removed out such limits.

fraudulent purposes, carried away to Rochester, London, Portsmouth, and other places not within the jurisdiction aforesaid, and the officers of the lord warden cannot, by reason of such removal, recover the same; be it enacted and declared, That from and after the passing of this act, it shall be lawful for the serjeant or serjeants of the admiralty of the Cinque Ports, deputies, or any other officer of the lord warden, whenever the case shall happen, to seize such anchor, cable, or other marine stores or merchandize, out of the jurisdiction aforesaid, and there to take and carry away the same to some one of the aforesaid public places of deposit, or to place the same in a place of security, till proceedings shall be instituted against the same, either in the Court of Admiralty of the Cinque Ports, or in the High Court of Admiralty.

Dealers in ships' stores to have their names painted on their store-houses.

XII. And be it further enacted, That all persons who shall trade or deal in buying and selling anchors, cables, sails, old junk or paper stuff, old iron, or marine stores of any kind or description, within the jurisdiction aforesaid, shall have their names, with the words, "Dealer in marine stores," painted distinctly in letters of not less than six inches in length, upon the front of all their storehouses, warehouses, and other depôts for such goods; and in default of their so doing, they shall, on conviction before any person or persons duly authorized to act as a magistrate or magistrates within the limits aforesaid, forfeit and pay any sum not exceeding twenty pounds, nor less than ten pounds, one-half of which penalties shall be paid to the informer, and the other moiety to the poor of the parish where such offence shall be committed; and further, that it shall not be lawful for such dealers or traders to cut up any cables, or part of the same, or to uncant, untwine, or unlay the same, or cordage of any description, into junk or paper stuff, nor any wounding, wounding, or worming, or any cable matting on the same, or on rigging, on any pretence whatsoever, without first obtaining a permit from the lord warden's deputies, or one of them, which permit shall not be granted unless an affidavit shall have been first made before some one of the persons duly authorized to act as magistrates within the limits of the Cinque Ports, two ancient towns and their members, and shall have been delivered to and left with the person granting such permit, in which affidavit there shall be sworn that the cable and cordage, so intended to be cut up, had been purchased fairly and without fraud by the party so intending to cut up the same, and without a knowledge or suspicion on his or her part, that the same had been or were dishonestly come by; and in which affidavit shall also be specified the particular quality and description of such cable or cordage, and the name or names of the seller or sellers thereof, which affidavit shall be recited and set forth at length in the permit thereupon granted.

Penalty.

No cables, &c. to be cut up without a permit from one of lord warden's deputies.

Dealers to keep an account of the marine stores bought by them.

XIII. And for the further and more effectual prevention of fraud in this respect, be it enacted, That all dealers in such marine stores as aforesaid, within the limits of the Cinque Ports, two ancient towns and their members, shall keep a book or books fairly written, in which entries shall be from time to time regularly made of all such marine stores as shall be by them from time to time bought, containing a true account and description of the times when the same

were so respectively bought by them, and of the names and places of abode of the respective sellers thereof; and also, that before the party who shall have obtained such permit for the cutting up of any such cable or cordage (as hereinbefore required to be obtained) shall proceed to cut up the same by virtue thereof, there shall be published by the space of one week at least before the time of cutting up of the same, one or more advertisements in some public newspaper printed within the counties of Kent, Sussex, and Essex, and near to the usual residence or place of abode of such party, notifying that such party had obtained such permit for the purpose of cutting up such quantity of cable or cordage, and of such kind and quality as therein described, a true copy of which permit shall be inserted in such advertisement; whereupon it shall be lawful for all and every person or persons who may have just cause to suspect, and shall have verified upon oath, the fact of such his, her or their suspicion before any of the persons duly authorized to act as magistrates within the limits aforesaid, by warrant of such magistrate to him or them for that purpose thereupon granted, to require of and from any such dealer who shall have so advertised, and shall be so sworn to be suspected as aforesaid, the production and examination of the book or books of entries hereby required by him to be kept, and to inspect and examine the cable or cordage described in such permit; and in case any such dealer shall, when so thereunto required as aforesaid, neglect or refuse to produce to the person named in such warrant as the person on whose oath the same had been obtained, the book or books containing the entries of such dealer so required to be made therein as aforesaid, or shall neglect to keep any such book or books in which entries containing accounts of the several particulars hereinbefore required to be entered shall be made, or to permit such inspection and examination as aforesaid, or shall, after obtaining such permit for the cutting up of any cable or cordage, and before the cutting up of the same, neglect to publish such one or more advertisements relative thereto, as is hereinbefore directed and required to be published, the dealer or dealers so offending in all or any of the particulars hereinbefore mentioned, shall forfeit and pay for every such offence, being his, her or their first offence, any sum not exceeding twenty pounds, nor less than ten pounds; and for every second and further offence, any sum not exceeding fifty pounds, nor less than thirty pounds; one-half of which penalties shall, on conviction before any of such magistrates duly authorized to act within the limits aforesaid, be paid to the informer, and the other half to the poor of the parish in which such offence shall be committed; and in case any of the penalties by this act imposed shall not be paid, with the charges incident to the conviction, immediately upon such conviction, the same shall and may be levied by the warrant of such magistrate as aforesaid, by distress upon the goods and chattels of every such offender or offenders; and in case there shall be no sufficient distress, then every such offender or offenders shall and may be committed by such magistrate as aforesaid, to the common gaol within the limits aforesaid, in the case of any first offence, for the space of three months, and in the case of any second or further

Notice to be advertised before cutting up cable or cordage.

Penalty for refusing to produce the book of entries, or neglecting to give notice before cutting up cable or cordage.

Penalties, how to be levied.

offence, for the space of six months, unless the said penalty and charges shall be sooner paid.

Inhabitants to be competent witnesses.

XIV. And be it further enacted, That the inhabitants of any parish, township, or place, within the jurisdiction aforesaid, shall be deemed and taken to be competent witnesses, for the purpose of proving the commission of any offence against this act, within the limits of such parish, township, or place, notwithstanding the penalty incurred by such offence, or any part thereof, is or may be given or applicable to the poor of such parish, township, place, or otherwise for benefit or use, or in aid or exoneration of such parish, township or place.

The lord warden and his deputies, judge, &c. to have the like power as justices of the peace or commissioners under this act.

XV. And be it further enacted, That the lord warden of the Cinque Ports for the time being, and the lieutenant of Dover Castle for the time being, and the deputy wardens of the Cinque Ports for the time being, and the judge official and commissary of the Court of Admiralty of the Cinque Ports, two ancient towns, and the members thereof for the time being, and any other officer who shall be specially appointed by the lord warden, and all and every of them, shall and may execute, perform, and do, within the jurisdiction aforesaid, all the acts, matters and things contained in this act, in like manner, to all intents and purposes, as any magistrate or magistrates, or any commissioner or commissioners to be appointed by virtue of this act, is and are authorized to execute, perform, and do the same.

Manner of issuing commissions for the punishment of offences, agreeably to 28 H. 8. c. 15.

XVI. And whereas by a certain act, passed in the twenty-eighth year of the reign of King Henry the Eighth, intituled "For Pirates," it is among other things enacted to the effect following, That whenever any commission for the punishment of certain offences therein named, shall be directed or sent to any place within the jurisdiction of the five ports, that then every such commission shall be directed unto the lord warden of the said port for the time being, or to his deputy, or unto three or four such persons, as the lord chancellor for the time being shall name and appoint: and whereas by the said act it is further enacted to the effect following, that every inquisition and trial to be had by virtue of such commission, shall be made and had by the inhabitants of the said five ports, or the members of the same: and whereas of a long time past, no such commission has been sent to any place within the jurisdiction of the Cinque Ports: be it enacted, for the more certain and speedy administration of justice that as often as his Majesty shall direct a commission, according to the provisions of the aforesaid act, to the admiral or admirals, or his or their lieutenant deputy and deputies, it shall and may be lawful for his Majesty, on the application of the lord warden of the Cinque Ports, to direct such commission jointly to the admiral or admirals, or his or their lieutenant deputy and deputies, and also to the lord warden of the Cinque Ports for the time being, and to his deputy: and the commissioners who shall sit by virtue of such commission, so jointly addressed, to whatever shire or place in the realm the same shall be limited, shall have full power and authority to inquire into, try, and determine all offences named in the said act, or in any other act relating to proceedings under such commission, by the oaths of twelve good and lawful inhabitants in the shire limited in the said

commission, whether the said offences shall have been committed within the jurisdictions of the lord admiral of England, or of the lord warden of the Cinque Ports; and all and every trial, conviction, judgment and proceeding whatsoever under such commission, shall be as good and effectual to all intents and purposes in law, and shall be followed by the same consequences to the offender or offenders, as if the same were had by virtue of any separate commission to be issued under the provisions of the aforesaid act of King Henry the Eighth: provided always, and it is hereby further declared, that this act, or anything herein contained, shall not extend or be construed to extend to the taking away, abridging, prejudicing or impeaching, in any manner whatever, the jurisdiction of the High Court of Admiralty of England, or the jurisdiction of the Admiralty Court of the Cinque Ports, two ancient towns, and their members; but that it shall and may be lawful for the said courts respectively, and the judge or judges thereof for the time being, to have, use, exercise, and enjoy jurisdiction over all such matters, rights, and offences, as they have heretofore had, used, exercised and enjoyed, as fully and effectually, to all intents and purposes whatever, as if this act had not been made; anything hereinbefore contained to the contrary in anywise notwithstanding.

Reservation of the rights of the Admiralty Court, and of the Admiralty of the Cinque Ports.

XVII. Provided also, and it is hereby further enacted and declared, That this act, or anything herein contained, shall not extend, or be construed to extend to the taking away, abridging, hindering, prejudicing or impeaching of any grant, liberties, franchises, and privileges heretofore granted to and vested in the Corporation of the Trinity House of Deptford Strond; but that the said corporation shall hold and enjoy the same as fully and effectually, to all intents and purposes, as they might have done in case this act had never been made; anything hereinbefore contained to the contrary thereof in anywise notwithstanding.

Reservation of the rights of the Trinity House.

XVIII. And whereas doubts have arisen as to the exact boundaries of the jurisdiction of the lord high admiral and the lord warden of the Cinque Ports, and it is highly expedient for the purposes of this act that the same should be clearly set forth; now it is hereby declared and enacted, That the boundaries of the jurisdiction of the lord warden of the Cinque Ports, in regard to any matter or thing contained in this act, shall be and shall be deemed and taken to be as follows; (that is to say), from a point to the westward of Seaford, in the county of Sussex, called Red Cliff, including the same; thence passing in a line one mile without the sand or shoal called The Horse of Willingdon, and continuing the same distance without the ridge and new shoals; and thence in a line within five miles of Cape Grisnez, on the coast of France; thence round the shoal called The Overfalls, two miles distance from the same; thence in a line without, and the same distance along the eastern side of the Galloper Sand, until the north end thereof bears west-north-west true bearing from the west-north-west bearing of the Galloper, it runs in a direct line across the shoal called The Thwart Middle, till it reaches the shore underneath the Maze Tower; from thence following in a line of the shore up to Saint Orsyth, in the county of Essex, and following the course of the shore up to the river Coln to the landing-place nearest Brightlingsea; from thence in a direct line to Shoe Bacon; from

Boundaries of the jurisdiction of the lord warden of the Cinque Ports.

thence to the point of Shellness, on the isle of Shippey; and from thence across the waters to Feversham; and from thence following the line of coast round the North and South Forelands, and Beachy Head, till it reaches the said Red Cliff, including all the waters, creeks, and havens comprehended between them: provided always, and it is hereby declared, that nothing in this act contained shall extend, or be construed to extend, to enlarge or abridge the local limits of the ancient jurisdiction, rights and privileges of the lord high admiral of England, or the lord warden of the Cinque Ports respectively, or their respective representatives; but that the same shall remain according to ancient usage, and that the description hereinbefore contained shall only be deemed applicable to the purposes of this act; any thing herein contained to the contrary notwithstanding.

For the better
adjustment and
payment of
salvage under
12 Ann. c. 18.

XIX. And whereas it is expedient that the like means of conclusively adjusting and recovering the quantum of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship, vessel, or goods, should subsist and be by law applicable in cases where the salvors shall have acted under and by the mere employment and authority of the commander or other superior officer, mariners, or owners of any ship or vessel in distress, as are now by law provided for adjusting the quantum of such monies or gratuities which shall have become due in cases where application shall have been first made to officers of the customs, or other the officer or officers in that behalf named and appointed in and by a certain statute made in the twelfth year of the reign of our late sovereign Lady Queen Anne, intituled, "An Act for Preserving of all such Ships and Goods thereof which shall happen to be forced on Shore or Stranded upon the Coasts of this Kingdom, or any other of her Majesty's Dominions," and where assistance shall have been thereupon rendered in pursuance of the provisions of that statute; be it therefore enacted and declared, that all and every the means which, in virtue of the statute last-mentioned, subsist, and may now be by law applied for the conclusively adjusting, and for the recovering of the quantum of the monies or gratuities to be paid to the several persons acting or being employed in the salvage of any ship, vessel, or goods, in cases where application shall have been first made pursuant to that statute, to officers of the customs, or other the officer or officers therein in that behalf mentioned, and assistance shall have been thereupon rendered and had in pursuance of the provisions of that statute, shall be by law applicable and available, in like manner to all intents and purposes, in cases where the salvors shall have acted under and by the mere employment and authority of the commander or other superior officers, mariners, or owners of any ship or vessel in distress, although no such application shall have been made to, nor any authority or assistance derived from, any officers of the customs, or other the officer or officers in the said statute in that behalf mentioned; and that, upon payment or tender and refusal of the quantum of monies or gratuities to be paid to the several persons who shall have acted or been employed in such salvage, or in case such payment or tender cannot be made, or security being given for the due payment thereof, to the satisfaction of the commissioners who shall have adjusted such quantum of gratuities, it shall

not be lawful for any officer of the customs, or other person or persons having the possession or custody of such ship, vessel, or goods, any longer to retain the possession or custody of the same, or any part thereof, by reason or pretence of any claim or right to a compensation or gratuity for such salvage as aforesaid, or for having acted or been employed therein.

XX. And be it further enacted and declared, that in all cases it shall be lawful for the owner or owners, or if the owner or owners refuse, for the salvors, to sell so much of the property saved, as will be sufficient to defray the salvage adjudged, and all expenses attending the same, and such other reasonable charges and expenses respecting the said property, as shall be allowed by the High Court of Admiralty, or by the Court of Admiralty of the Cinque Ports, or by the commissioners appointed under this act; and that on the production of an order or decree from the High Court of Admiralty, or from the Court of Admiralty of the Cinque Ports, or of an award made by the commissioners appointed under this act, the commissioners of customs and excise shall be empowered and required, and they are hereby empowered and required, to allow the sale of such goods as aforesaid, free from the payment of all duties: provided nevertheless, that in all cases in which they may think it advisable, it shall be lawful for the commissioners of the customs and excise to refer any such award which may be produced to them from the commissioners appointed under this act, to the judgment or revision of the High Court of Admiralty.

Owners or salvors may sell so much of the property saved as will defray salvage.

XXI. Provided always, that nothing herein in this behalf contained shall extend, or be construed to extend, to affect or impeach the jurisdiction to be exercised within the Cinque Ports, or to affect or abridge in any degree the jurisdiction or authority of the High Court of Admiralty.

Jurisdiction of Cinque Ports not to be affected.

XXII. And be it further enacted, that this act shall be a public act, and shall be judicially taken notice of as such, by all judges, justices, and others, without being specially pleaded.

Public act.

The Schedule to which this Act refers.

On the day of in the year of our
 Lord before, &c. at
 in the county of

[Ship's Names.]

A. B. [*here insert the name of the salvors*] against the said ship, whereof was master, her tackle, apparel, and furniture, and the goods, wares, and merchandizes on board the same; and also against the said master, and the owners of the said ship and cargo [*or, as the case may be,*] against certain goods and merchandizes lately laden on board the said ship, whereof was master; and also against the said master, and the owners (or if the owner's alone appear by themselves or agents, then leave out the master's name) of the said goods and merchandizes], in a cause of salvage.

owners of the said goods and merchandizes, in the sum of pounds of lawful money of Great Britain, unto the said *A. B. &c.* to answer the salvage and expenses of the said ship and cargo [*or, as the case may be,*] on the said goods and merchandize, as shall hereafter be decreed by the said Court, according to the tenor of the act in that behalf made and provided; and unless they shall so do, they hereby consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, wheresoever the same shall be found, to the value of the sum above mentioned.

[Master's Names.]

On which day appeared personally *W. Z.* of and *Y. Z.* of who produced themselves as sureties for the said the master, and for the owners of the said ship and cargo [*or, as the case may be,*] for the said master and owners of the said goods and merchandizes, and submitting themselves to the jurisdiction of the High Court of Admiralty of England [*or, the Court of Admiralty for the Cinque Ports, as the case may be,*] bound themselves, their heirs, executors, and administrators, for the said master and owners of the said ship and cargo [*or, as the case may be,*] for the said master and owners, or, for the

This bail was duly taken, acknowledged, and received at the time and place above written, before me the undersigned Commissioner; and I do hereby further certify, that I do believe and consider the persons above mentioned sufficient security for the sum of pounds.

W. Z.

Y. Z.

No. XXIII.

5 & 6 Wm. 4, c. 19.

An Act to amend and consolidate the Laws relating to the Merchant Seamen of the United Kingdom, and for Forming and Maintaining a Register of all the Men engaged in that Service.

WHEREAS the prosperity, strength, and safety of this United Kingdom and of his Majesty's dominions do principally depend on a large, constant, and ready supply of seamen, as well for carrying on the commerce as for the defence thereof; and it is therefore necessary to aid by all practicable means the increase of the number of such seamen, and to give them all due encouragement and protection, and to this end to amend and consolidate the laws relating to their regulation and government: Be it therefore enacted by the king's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, That from and after the thirty-first day of July one thousand eight hundred and thirty-five, from which day this act shall commence and take effect, an act passed in the second year of the reign of her late Majesty Queen Anne, for the increase of seamen, and better encouragement of navigation, and security of the coal trade; and also an act passed in the second year of the reign of his late Majesty king George the Second, for the better regulation and government of the seamen in the merchant service; and also an act passed in the second year of the reign of his late Majesty king George the Third, for making perpetual the last mentioned act, and for extending the provisions thereof to his Majesty's colonies in America; and also an act passed in the thirty-first year of the reign of his said Majesty king George the Third, for the better regulation and government of seamen employed in the coasting trade of this kingdom; and also an act passed in the forty-fifth year of the reign of his said late Majesty, for amending the last mentioned act; and also an act passed in the thirty-seventh year of the reign of his said Majesty king George the Third, for preventing the desertion of seamen from British merchant ships trading to his Majesty's colonies and plantations in the West Indies; and also an act passed in the fifty-eighth year of the reign of his said late Majesty king George the Third, to extend and render more effectual the regulations for the relief of seafaring men and boys, subjects of the United Kingdom, in foreign parts; and also an act passed in the fourth year of the reign of his late Majesty king George the Fourth, for regulating the number of apprentices to be taken on board British merchant vessels, and for preventing the desertion of seamen therefrom; and also an act passed in the fourth year of his present Majesty's reign, for continuing an act of the fifty-ninth year of king George the Third, for facilitating the recovery of the wages of seamen in the merchant service, shall be and the same are hereby declared to be repealed: Provided always, that all offences which shall have been committed, and all penalties and forfeitures which

After the 31st
July 1835 the
acts 2 & 3
Ann. c. 6.

2 Geo. 2, c.
36.

2 Geo. 3, c.
31.

31 Geo. 3, c.
39.

45 Geo. 3, c.
81.

37 Geo. 3, c.
73.

58 Geo. 3, c.
38.

4 Geo. 4, c.
25.

3 & 4 Wm. 4,
c. 88,
and 59 Geo. 3,
c. 54.

shall be re-
pealed.

shall have been incurred previous to the commencement of this act, against the provisions of the said acts, shall and may be punishable and recoverable under the said acts as if the same had not been repealed.

No seaman to be taken to sea without a written agreement.

II. And be it further enacted, That it shall not be lawful for any master of any ship or vessel belonging to any subject of his Majesty of this United Kingdom trading to parts beyond the seas, or of any British registered ship of the burthen of eighty tons or upwards employed in any of the fisheries of the United Kingdom, or in trading coastwise or otherwise, to carry to sea on any voyage, either from this kingdom or from any other place, any seaman or other person as one of his crew or complement (apprentices expected), without first entering into an agreement in writing with every such seaman, specifying what monthly or other wages each such seaman is to be paid, the capacity in which he is to act, and the nature of the voyage in which the ship is intended to be employed, so that the seaman may have some means of judging of the probable period for which he is likely to be engaged; and the said agreement shall contain the day of the month and year in which the same shall be made, and shall be signed by the master in the first instance, and by the seamen respectively at the port or place where such seamen shall be respectively shipped; and the master shall cause the same to be, by or in the presence of the party who is to attest their respective signatures thereto, truly and distinctly read over to every such seaman before he shall be required to sign the same, in order that he may be enabled to understand the purport and meaning of the engagement he enters into and the terms to which he is bound.

Regulations respecting forms of agreements.

III. And be it further enacted, That in the cases of ships as aforesaid bound to parts beyond the seas, except as hereinafter provided, every such agreement shall be in the form and shall contain true entries under their respective heads of the several particulars set forth in the schedule to this act annexed and marked (A.); so far as the same can be ascertained; and that the owners and the master of every such ship, or one of them, shall, on reporting his ship's arrival at her port of destination in the United Kingdom, deposit or cause to be deposited with the collector or comptroller of the customs at such port a true copy of such agreement, attested by the signature of the master, to the intent that every person who may be interested in any such agreement may at all times have the means of knowing the terms and conditions thereof; and that in the cases of ships employed in fishing on the coasts of the United Kingdom, and of ships regularly trading from one part of the United Kingdom to another, and of ships regularly trading or making regular voyages to any of the islands of Jersey, Guernsey, Alderney, Sark, and Man, or to any port on the Continent of Europe, between the river Elbe inclusive, and Brest, the agreement to be entered into as aforesaid shall be in the form, and shall contain true entries under their respective heads of the particulars set forth in the schedule to this act annexed and marked (B.), so far as the same can be ascertained; and that the owner or one of the owners of every such ship employed in fishing, or in trading in any of the cases last mentioned shall to the like intent, within ten days next after the expiration of every six months

ending on the thirtieth day of June and the thirty-first day of December in each year, deposit with the collector or comptroller of the customs of the port to which the ship shall belong a true copy of every agreement which shall have been entered into with any person composing part of the crew thereof within the preceding six months, attested by the signature of such owner; and all copies of agreements so required by this act to be deposited as aforesaid shall, when the same shall have been so deposited, and shall be required to be produced in evidence on the part of any seaman, be received and taken as legal proof of the contents of the agreement.

IV. And be it further enacted, That if any master of any such ship as aforesaid shall carry out to sea any seaman (apprentices excepted) without having first entered into such agreement as is hereby required, he shall for every such offence forfeit and pay the sum of ten pounds for or in respect of each and every such seaman he shall so carry out contrary to this act; and if any master shall neglect to cause the agreement to be distinctly read over to each such seaman, as by this act he is enjoined, he shall for every such neglect forfeit and pay the sum of five pounds; and if any master shall neglect to deposit with the collector or comptroller of the customs, a copy of the agreement hereby required to be made and deposited as aforesaid, or shall wilfully deposit a false copy of any such agreement, he shall for every such neglect or offence forfeit and pay the sum of fifty pounds.

Penalty for default

V. And be it further enacted, That no seaman, by entering into or signing such agreement as aforesaid, shall forfeit his lien upon the ship, nor be deprived of any remedy for the recovery of his wages which seamen are now lawfully entitled to against either the ship, the master or the owners thereof; nor shall any agreement made contrary to or inconsistent with the provisions of this act, or any clause whereby a seaman shall consent to forego the right which the maritime law gives him to wages in the case of freight earned by ships subsequently lost, or containing any words to that effect, be valid or binding on any seaman signing the same; and that in cases in which it may be necessary that the agreement should be produced to sustain a claim on the part of a seaman no obligation shall lie upon the seaman to produce the same, nor shall any seaman fail in any suit or proceeding for the recovery of his wages for want of the production of any such agreement, or of any deposited copy thereof as aforesaid, or for the want of any notice to produce the same; any law or usage to the contrary notwithstanding.

Seamen not to be deprived of legal remedies.

No agreement contrary to the act to be valid.

Seamen not bound to produce agreement.

VI. And be it further enacted, That in case a seaman shall at any time, after having signed an agreement as hereinbefore mentioned, neglect or refuse to join the ship on board of which he shall have engaged to serve, or shall refuse to proceed to sea in her, or shall absent himself therefrom without leave, it shall be lawful for any justice of the peace in any of his Majesty's dominions at home or abroad near to the place where such ship shall happen to be, upon complaint of the fact made upon oath by the master, mate, or owner thereof, and such justice is hereby required, by his warrant, to cause such seaman to be apprehended and brought before him; and in case such seaman shall not give a reason to the satisfaction of such justice

Seamen refusing to join or to proceed in the ship, or absents themselves therefrom, may be committed to gaol.

for his neglect, refusal, or absence, as the case may be, upon due proof of such neglect, refusal, or absence, it shall be lawful for any such justice to commit such seaman to the House of Correction, there to be kept to hard labour for a period not exceeding thirty days: Provided always, that in case such seaman, on being apprehended and brought before the said justice, shall consent to join the ship and proceed on the voyage for which he shall have agreed, it shall be lawful for the said justice, at the request of the master, instead of committing such seaman, to cause him to be conveyed on board the said ship, or to be delivered to the master for the purpose of proceeding on the voyage, and also to award to the master such costs incurred in the apprehension of the seaman as to such justice shall seem reasonable, not exceeding in any case the sum of forty shillings, which shall be chargeable against and may be abated from the wages to grow due to such seaman.

Forfeiture for temporary absence from duty.

VII. And be it further enacted, That if any seaman, after having signed such agreement as aforesaid, or after the ship on board which he shall have agreed to serve shall have left her first port of clearance, and before the period for which he shall have agreed to serve shall be completed, shall wilfully and without leave absent himself from the ship, or otherwise from his duty, he shall (in all cases not of absolute desertion, or not treated as such by the master,) forfeit out of his wages to the master or owner of such ship, the amount of two day's pay for every twenty-four hours of such absence, and in a like proportion for any less period of time, or, at the option of the said master, the amount of such expenses as shall have been necessarily incurred in hiring a substitute to perform his work; and in case any seaman while he shall belong to the ship shall without sufficient cause neglect to perform such his duty as shall be reasonably required of him by the master or other person in command of the ship, he shall be subject to a like forfeiture in respect of every such offence, and of every twenty-four hours continuance thereof; and in case any such seaman, after having signed such agreement, or after the ship's arrival at her port of delivery, and before her cargo shall be discharged, shall quit the ship without a previous discharge or leave from the master thereof, he shall forfeit to the master or owner one month's pay out of his wages: Provided always, that no such forfeitures shall be incurred, unless the fact of the seaman's temporary absence, neglect of duty, or quitting the ship, shall be duly entered or recorded in the ship's log-book, which entry shall specify truly the hour of the day at which the same shall have occurred, and the period during which the seaman was absent or neglected his duty, the truth of which entry it shall be incumbent on the owner or master in all cases of dispute to substantiate by the evidence of the mate or some other credible witness.

How amount of forfeiture is to be ascertained when seamen contract for the voyage.

VIII. And be it further enacted, that in all cases where the seaman shall have contracted for wages by the voyage or by the run, and not by the month or other stated period of time, the amount of forfeitures to be incurred by seamen under this act shall be ascertained in manner following, that is to say, if the whole time spent in the voyage agreed upon shall exceed one calendar month, the forfeiture of one month's pay, expressed in this act, shall be accounted and

taken to be a forfeiture of a sum of money bearing the same proportion to the whole wages as a calendar month shall bear to the whole time spent in the voyage, and in like manner a forfeiture of two day's pay or less shall be accounted and taken to be a forfeiture of a sum bearing the same proportion to the whole wages as the same period of time shall bear to the whole time spent in the voyage; and if the whole time spent in the voyage shall not exceed one calendar month, the forfeiture of one month's pay shall be accounted and taken to be a forfeiture of the whole wages contracted for; and if such time shall not exceed two days, the forfeiture of two day's pay shall be accounted and taken to be a forfeiture of the whole wages contracted for; and the master is hereby authorized to abate the amount of all forfeitures hereinbefore enacted out of the wages of any seaman incurring the same.

IX. And be it further enacted, that every seaman who shall absolutely desert the ship to which he shall belong shall forfeit to the owner or master thereof all his clothes and effects which he may leave on board, and all wages and emoluments to which he might otherwise be entitled, provided the circumstances attending such desertion be entered in the log-book at the time and certified by the signature of the master and mate, or other credible witness; and that an absence of a seaman from the ship for any time within the space of twenty-four hours immediately preceding the sailing of the ship without permission from the master thereof, or for any period however short, under circumstances plainly showing that it was his intention not to return thereto, shall be deemed an absolute desertion; and in case any such desertion shall take place in parts beyond the seas, and the master of the ship shall be under the necessity of engaging any seaman as a substitute for the deserter at a higher rate of wages than that stipulated in the agreement to be paid to the seaman deserting, the owner or master of the ship shall be entitled to recover from the deserter by summary proceeding, in the same manner as wages are by this act made recoverable, any excess of wages which such owner or master shall pay to such substitute beyond the amount which would have been payable to the deserter in case he had duly performed his service pursuant to his agreement.

Forfeiture for desertion.

Increased wages paid in consequence of desertion recoverable from the deserter.

X. And be it further enacted, that if any person shall, either on shipboard or on shore, harbour or secrete a seaman who shall have signed an agreement to proceed on a voyage to parts beyond the seas, and shall have deserted or absented himself without leave from his ship, knowing or having reason to believe him to be a deserter or to be absent without leave, every person so offending shall for every such seaman so harboured or secreted forfeit and pay the sum of ten pounds; and that no debt exceeding in amount five shillings, incurred by any seaman after he shall have signed any such agreement as aforesaid, shall be recoverable until the voyage agreed for shall have been concluded; nor shall it be lawful for any keeper of a public-house or of a lodging-house for seamen to withhold or detain any chest, bed, or bedding, clothes, tools, or other effects of any seaman, for any pretended debt alleged to have been contracted by any such seaman; and in case any such chest, bed, bedding, clothes, tools, or

Penalty for harbouring deserters.

No debt exceeding 5s. recoverable from a seaman till voyage is ended.

Seamen's effects not to

be detained by keepers of lodging-houses under pretence of debt.

The period within which wages are to be paid.

Such payment of wages to be deemed valid notwithstanding bill of sale, &c.

Masters to give seamen their certificates on their discharge.

Penalty for default.

For obtaining immediate pay-

other effects as aforesaid shall be withheld or detained contrary to this act, it shall be lawful for any justice of the peace, in any part of his Majesty's dominions, upon complaint upon oath to be made by any such seaman or on his behalf, to inquire into the matter, and if he shall see right by warrant under his hand and seal to cause any such property or effects so withheld or detained contrary to this act to be seized and delivered over to the seaman.

XI. And be it further enacted, that the master or owner of every ship shall and he is hereby required to pay to every seaman entering into such contract as aforesaid his wages, if the same shall be demanded within the respective periods following, that is to say, if the ship shall be employed in trading coastwise, the wages shall be paid within two days after the termination of the agreement, or at the time when any such seaman shall be discharged, whichever shall first happen; and if the ship shall be employed in trading otherwise than coastwise, then the wages shall be paid at the latest within three days after the cargo shall have been delivered, or within ten days after the seaman's discharge, whichever shall first happen; in either of which last-mentioned cases of payment being delayed, the seaman shall at the time of his discharge be entitled to be paid on account a sum equal to one-fourth part of the estimated balance due to him; and in case any master or owner shall neglect or refuse to make payment in manner aforesaid, he shall for every such neglect or refusal forfeit and pay to the seaman the amount of two day's pay for each day not exceeding ten days during which payment shall without sufficient cause be delayed beyond the period at which such wages or part wages are hereby required to be paid as aforesaid; for the recovery of which forfeiture the seaman shall have the same remedies as he is by law entitled to for the recovery of his wages: provided always, that nothing in this clause contained shall extend to the cases of ships employed in the southern whale fishery, or on voyages for which seamen by the terms of their agreement are compensated by shares in the profits of the adventure.

XII. And be it enacted and declared, that every such payment of wages to a seaman shall be valid and effectual in law notwithstanding any bill of sale or assignment which may have been made by any such seaman of such wages, or of any attachment or incumbrance thereon; and that no assignment or sale of wages made prior to the earning thereof, nor any power of attorney expressed to be irrevocable for the receipt of any such wages, shall be valid or binding upon the party making the same.

XIII. And be it further enacted, that upon the discharge of a seaman from the ship in which he shall have served he shall be entitled to receive from the master a certificate of his service and discharge, specifying the period of service and the time and place of the discharge of such seaman, which certificate shall be signed by the master; and if any master shall refuse to give such certificate to any such seaman without having reasonable cause for his refusal, he shall for every such offence forfeit and pay to him the sum of five pounds.

XIV. And be it further enacted, that if after a seaman shall have been discharged from any ship or vessel three days he shall be de-

sirous of proceeding to sea on another voyage, and in order thereto shall require immediate payment of the wages due to him, it shall be lawful for any justice of the peace in any part of his Majesty's dominions, on application from such seaman, and on satisfactory proof that he would be prevented from employment by delay, to summon the master or owner of such ship or vessel before him, and to require cause to be shown why immediate payment of such wages should not be made; and if it shall appear to the satisfaction of such justice that there is no reasonable cause for delay he shall order payment to be made forthwith, and in default of compliance with such order such master or owner shall forfeit and pay the sum of five pounds.

nment of wages
of seamen in
certain cases.

XV. And whereas seamen, in cases of dispute, may be exposed to great inconvenience, expense, and delay in obtaining payment of their wages; for remedy thereof be it enacted, that in all cases of wages not exceeding twenty pounds which shall be due and payable to a seaman for his service in any ship as aforesaid, it shall be lawful for any justice of the peace in any part of his Majesty's dominions residing near to the place where the ships shall have ended her voyage, cleared at the custom-house, or discharged her cargo, or near to the place where the master or owner upon whom respectively the claim is made shall be or reside, upon complaint on oath to be made to such justice by any such seaman or on his behalf, to summon such master or owner to appear before him to answer such complaint, and upon the appearance of such master or owner, or in default thereof, on due proof of his having been so summoned, such justice is hereby empowered to examine upon the oath of the parties and their respective witnesses (if there be any) touching the complaint and the amount of wages due, and to make such order for payment thereof as shall to such justice appear reasonable and just; and in case such order shall not be obeyed within two days next after the making thereof it shall be lawful for such justice to issue his warrant to levy the amount of the wages awarded to be due, by distress and sale of the goods and chattels of the party on whom such order for payment shall be made, rendering to such party the overplus (if any shall remain of the produce of the sale) after deducting thereout all the charges and expenses incurred by the seaman in the making and hearing of the complaint, as well as those incurred by the distress and levy and in the enforcement of the justice's order; and in case sufficient distress cannot be found it shall be lawful for the said justice to cause the amount of the said wages and expenses to be levied on the ship in respect of the service on board which the wages are claimed, or the tackle and apparel thereof; and if such ship shall not be within the jurisdiction of such justice, then he is hereby empowered to cause the party upon whom the order for payment shall be made to be apprehended and committed to the common gaol of the county, there to remain without bail until payment shall be made of the amount of the wages so awarded, and of all costs and expenses attending the recovery thereof; and the award and decision of such justice as aforesaid shall be final and conclusive as well on every such seaman as on the owner and master of the ship.

Summary mode
of recovering
wages not ex-
ceeding 20*l*.

XVI. And be it further enacted, that if any suit for the recovery of a seaman's wages shall be instituted against the ship, or the master

In what case
costs of suit for

recovery of wages not to be allowed.

or owner thereof, either in the High Court of Admiralty or in any Vice-admiralty Court, or against the master or owner in any court of record in his Majesty's dominions, and it shall appear to the judge in the course of such suit that the plaintiff might have had as effectual a remedy for the recovery of his wages by complaint to a justice of the peace as hereinbefore provided, then and in every such case it shall be lawful for such judge and he is hereby required to certify to that effect, and thereupon no costs of suit shall be awarded to the plaintiff.

When ship is sold at a foreign port, the crew to be sent home at the expense of the master or owners.

XVII. And be it further enacted, that whenever any ship whatever belonging to any subject of the United Kingdom, except in cases of wreck or condemnation, shall be sold at any port out of his Majesty's dominions, the master in all such cases (unless the crew in the presence of the British consul or vice-consul, or in case of there not being any such consul or vice-consul, then in the presence of one or more British resident merchants at such port, shall signify their consent in writing to be there discharged,) shall and he is hereby required, besides paying them the wages to which they shall be entitled under the agreement, either to provide them with adequate employment on board some other British vessel homeward bound, or to furnish the means of sending them back to the port in his Majesty's dominions at which they were originally shipped, or to some port in the United Kingdom, as shall be agreed upon, by providing them with a passage home, or depositing with the consul or vice-consul such a sum of money as shall be by him deemed reasonably sufficient to defray the expenses of their subsistence and passage; and if the master shall refuse or neglect to do so, such expenses when defrayed shall be a charge upon the owner whose ship shall be so sold, except in cases of barratry, wreck, or condemnation, and may be recovered against such owner as so much money paid and expended on his account, together with full costs, at the suit of the consul or other person defraying such expenses, or of his Majesty's attorney-general on behalf of his Majesty, in case the same shall have been allowed to the consul out of the public monies.

A supply of medicines to be kept on board, and seamen hurt in the service of the ship to be provided with advice, &c. gratis.

XVIII. And whereas it is necessary that due provision should be made for the preservation of the health and lives of the seamen employed in the merchant service; be it further enacted, that every ship sailing from the United Kingdom to any place out of the same shall have and keep constantly on board the same a sufficient supply of medicines suitable to accidents and diseases arising on sea voyages, which shall be renewed from time to time as shall be found requisite; and in case any default shall be made in providing or keeping supplied such medicines as aforesaid, or in case any of the seamen shall receive any hurt or injury in the service of the ship, the expense of providing the necessary surgical and medical advice, and attendance and medicines which the seaman shall stand in need of until he shall have been cured or shall have been brought back to some port of the United Kingdom, shall be borne and defrayed by the owner and master of the ship, or one of them, without any deduction whatever on that account from the seaman's wages.

Establishment of register

XIX. And whereas it is expedient that a register should be formed and maintained of all the mariners and seafaring men of the United

Kingdom, be it therefore enacted, that as soon as conveniently may be after the passing of this act there shall be established in the port of London an office, to be called "The General Register Office of Merchant Seamen," which shall consist of a registrar and such assistants and clerks with such salaries and allowances as shall be fixed and regulated from time to time by the lord high admiral or the commissioners for executing the office of lord high admiral of the United Kingdom for the time being, and that such office shall be kept at the custom-house of the said port, and daily attendance shall be given thereat during the usual hours of business there; and the said registrar, his assistants, and clerks, shall be under the control and directions of the said lord high admiral or the commissioners for executing the office aforesaid for the time being.

XX. And be it further enacted, that for the more readily carrying this act into execution all letters and packets addressed to and sent by the said registrar upon any business relating to the register office created by this act shall be free from the duty of postage; and that all letters and packets which shall be forwarded by the said registrar in the execution of his duty as such registrar shall be under a cover, with the words "Pursuant to act of Parliament of the fifth year of king William the Fourth," printed thereon, and the said registrar shall sign his name under such words, and every such cover shall be sealed with the seal of his office; and if the said registrar or any other person shall send or cause to be sent, under any such cover any paper, letter, or writing, or any inclosure, other than what shall relate to the public business of the said office, every person shall for every such offence forfeit and pay the sum of one hundred pounds.

Letters to and from registrar to be free from postage.

XXI. And whereas by an act of the last session of Parliament, intituled "An Act to amend an Act of the twentieth Year of his Majesty King George the Second, for the Relief and Support of Sick, Maimed, and Disabled Seamen, and the Widows and Children of such as shall be Killed, Slain, or Drowned in the Merchant Service, and for other Purposes," a certain book by way of muster roll is for the purposes of the said act required to be kept on board merchant ships, which book is to contain such entries and statement of account as by the said act is required: and whereas it is expedient for the better effectuating the objects of this act that a due return should be made to the said registrar of merchant seamen of many of the particulars in the said act specified; be it therefore further enacted, that the master of every ship belonging to any subject of his Majesty, and bound to parts beyond the seas, except in the cases next hereinafter provided, shall not only keep the book so required by the said recited act, but shall, on reporting his ship on her arrival at her port of destination in the United Kingdom, deliver or cause to be delivered to the collector or comptroller of the customs at such port an account, signed by himself, of all the seamen and others (including apprentices) who shall have belonged to the ship at any time during her absence from the United Kingdom, which account shall contain a true and correct return under their respective heads of the several particulars expressed in the form set forth in the Schedule annexed to this act, and marked (C).

Masters of ships trading abroad to deliver lists of their crews on their return.
4 & 5 Wm. 4, c. 52.

Masters of ships in the home trade to return similar lists.

XXII. And be it further enacted, that within twenty-one days after the thirtieth day of June and the thirty-first day of December in each year, the owner or one of the owners of every ship as aforesaid employed in fishing on the coasts of the United Kingdom, or in regularly trading from one part of the United Kingdom to another, and of every ship regularly trading or making regular voyages to any of the islands of Jersey, Guernsey, Alderney, Sark, and Man, or to any port on the continent of Europe between the river Elbe inclusive and Brest, shall deposit or cause to be deposited with the collector or comptroller of the customs of the port to which the ship shall belong, or with the said registrar in London, an account, signed by such owner, or by the master, of the voyages in which any such ship shall have been engaged during the preceding half year ending on the respective days above mentioned, and setting forth the Christian and surnames of the several persons (including the master and apprentices) who shall have belonged to the ship at any time during such periods respectively, which account shall be in the form and shall contain a true and correct return under their respective heads of the several particulars expressed in the Schedule marked (D.), and to this act annexed.

Return to be made in case of ship lost or sold abroad.

XXIII. And be it further enacted, that in case any ship as aforesaid shall be lost or sold while absent from the United Kingdom, then an account containing a similar return as required in the several and respective cases before mentioned, which shall be made out up to the period of such loss or sale, shall by the persons who shall at that time have been respectively owner and master thereof, or by one of them, be delivered or transmitted to the said registrar in the port of London so soon as he shall be enabled to make such return after the loss, and within twelve calendar months at farthest after the sale of the ship.

Lists to be certified, and transmitted to the registrar.

XXIV. And be it further enacted, that the said several accounts and returns by this act required to be deposited with or delivered to the collector or comptroller as aforesaid shall by such officers of the customs be transmitted from time to time to the said registrar for the purposes of this act; and every such owner or master of any ship as aforesaid, who shall refuse or wilfully neglect to deliver or cause to be delivered any such list or account as by this act is required, shall for every such refusal or neglect forfeit and pay the sum of twenty-five pounds.

Penalty on the master for neglect.

As to the disposal of the effects of seamen dying abroad.

XXV. And in order that due care may be taken of the effects of British seamen dying in foreign parts, and that a proper disposition may be made thereof, be it further enacted, that whenever a British seaman being abroad shall die elsewhere than on board a British ship, leaving any money or effects within the limits of any British consulate, it shall be lawful for his Majesty's consul there and he is hereby required to claim and take charge of all such money and effects, and to dispose of the said effects for the benefit of the next of kin of the deceased or other person who may be by law entitled to the same; and in case no claim shall be made to the same within three calendar months after the death of such seaman, the said consul shall, after abating the amount of any expenses which shall have been incurred in getting in the assets of the deceased, remit the balance of all such

monies which either have already arisen or shall hereafter arise by the means aforesaid to the president and governors of the corporation "For the relief and support of sick, maimed, and disabled seamen, and of the widow and children of such as shall be killed, slain, or drowned in the merchant service," to be by such president and governors paid over and disposed of in the same manner and under the same regulations as are provided by the said recited act of the last session of Parliament with respect to the wages of seamen dying on board merchant ships; and in case any seaman so dying as last mentioned shall leave on board the ship to which he shall belong any monies, clothes, or other effects, and the same shall not be claimed within one month after the ship's return to the United Kingdom by the executor or administrator of the deceased, then the master of the said ship shall and he is hereby required to deposit the same or the proceeds arising therefrom with the president and governors aforesaid, to be by them disposed of in the same manner as is provided by the said act with respect to the wages of deceased seamen.

XXVI. And whereas the giving due encouragement to such of the youth of the United Kingdom as shall voluntarily betake themselves to the sea service, and obliging others to do so who by reason of their own or their parent's poverty are destitute of the means of obtaining subsistence and employment, will not only greatly tend to the increase of able and experienced seamen, as well for the service of the Royal Navy as for carrying on the commerce of his Majesty's subjects, but will likewise provide them with employment, and thus materially diminish the burthen of expense cast upon parishes by their maintenance; be it therefore enacted, that it shall be lawful for the overseers of the poor or other persons having the authority of overseers of the poor of any parish, township, or place in the United Kingdom, or in whom the duty of overseers or guardians of the poor shall or may be vested, and they are hereby empowered to bind by indenture and put out any boy having attained the age of thirteen years, and of sufficient health and strength, who or whose parent or parents is or are chargeable to or maintained by any such parish or township, or who shall beg for alms therein, with his consent but not otherwise, an apprentice in the sea service to any of his Majesty's subjects being the master or owner of any ship registered in any port of the United Kingdom, for so long time and until such boys shall respectively attain the age of twenty-one years, which binding shall be as effectual in the law to all intents and purposes as if such boy had been bound by virtue of any statute now in force respecting the binding of parish apprentices, or as if such boy were of full age and had bound himself an apprentice, and notwithstanding the residence of the master or owner to whom he may be bound shall be more than forty miles distant from such parish or place: provided always, that every such binding shall be made in the presence of two justices of the peace acting for the county, riding, division, city, borough, or place within which such parish or township shall be situate, which justices shall execute the indenture in testimony of their having been satisfied that such boy hath attained the age and is of sufficient health and strength as required by this act; and to the end that the period

Parish boys
may be put out
apprentices
in the sea
service.

when the service under such indenture shall expire may the more certainly appear, the age of every such boy shall be inserted in his indenture, the same being truly taken from a copy of the entry of his baptism in the register-book of the parish in which he was born (where the same can be obtained), which copy shall be given and attested by the officiating minister of such parish without fee or reward; and in cases where no such entry of baptism can be found the justices aforesaid shall inform themselves as fully as they can of such boy's age, and from such information shall insert the same in his said indenture, and the age of every such boy so inserted therein shall (in relation to the continuance of his service) be taken to be his true age without any further proof thereof.

Parish apprentices may be turned over to the sea service.

XXVII. And be it further enacted, That it shall be lawful for any master or person to whom any poor parish apprentice shall have been or shall be hereafter bound to a service on shore according to the statutes already in force relating to such apprentices, or for the executors or administrators, or, there being none such, for the widow of any such deceased master, with the concurrence of two or more justices of the peace residing in or near to the place where such poor boy shall have been bound apprentice, to assign and turn over such poor boy, with his consent but not otherwise, apprentice to any master or owner of any ship not having her complement of apprentices as hereinafter required, to be employed by such master or owner in the sea service during the period then remaining unexpired of his apprenticeship.

Indentures may be assigned on the death of the master.

XXVIII. And be it further enacted, That in the event of the death of the master of any such poor or parish apprentice to the sea service, it shall be lawful for the widow or the executor or administrator of such deceased master to assign the indenture of any such apprentice for the residue of the term then unexpired therein to any master or owner of any such ship not having the complement of apprentices as hereinafter required; all which assignments, if executed within the limits of the port of London, shall be attested by the said registrar, or one of his assistants or clerks, and if at any other port shall be attested by the collector or comptroller of the customs of such port.

Parish officers to prepare indentures.

XXIX. And be it further enacted, That such overseers or other persons as aforesaid shall cause the indentures of apprenticeship to be prepared and transmitted in duplicate, if the master or owner of the ship to whom such apprentice is to be bound shall be or reside within the limits of the port of London, to the said registrar, and if at any other port to the collector or comptroller of the customs at such port; and the said overseers or other persons as aforesaid shall cause each such poor boy to be conducted and conveyed to such port or place by the constable, and at the expense of the parish or township sending him thither, and shall also, upon the execution by the master of the counterpart of the indentures, cause to be paid down to the master the sum of five pounds, to be expended in providing such boy with necessary sea clothing and bedding; which sum, as well as the expenses to be incurred in the conveyance of the boy as aforesaid, shall, when paid, be allowed to them in their accounts of monies expended in relation to the poor.

Constable to convey the apprentice.

XXX. And be it further enacted, That the counterparts of all such indentures shall, if the master shall be or reside within the limits of the port of London, be executed in the presence of and attested by the said registrar, or one of his assistants or clerks, and if at any other port by the collector or comptroller of the customs at such port, and also in both cases by the constable or other officer who shall convey such apprentices thither, and such indentures shall bear date respectively on the days on which they are executed; and the constable on his return shall deliver such counterparts to the overseers or other persons as aforesaid, to be by them registered and preserved.

How counterparts of indentures to be attested.

XXXI. And be it further enacted, That the master of every ship belonging to any subject of the United Kingdom, and of the burthen of eighty tons and upwards, shall have on board thereof, at the time of clearing out from any port of the United Kingdom, one apprentice or more, in the following proportions to the number of tons of his ship's admeasurement, according to the certificate of registry; that is to say, every ship of eighty tons and under two hundred tons shall have one apprentice at the least; every ship of two hundred tons and under four hundred tons shall have two apprentices at the least; every ship of four hundred tons and under five hundred tons shall have three apprentices at the least; every ship of five hundred tons and under seven hundred tons shall have four apprentices at the least, and every ship of seven hundred tons and upwards shall have five apprentices at the least, all of whom at the period of their being bound respectively, shall have been under seventeen years of age, and shall have been duly bound for the term of four years at the least; and if any such master shall neglect to have on board his ship the number of apprentices as hereby required, he shall for every such offence forfeit and pay the sum of ten pounds in respect of each apprentice so deficient.

Every ship to have apprentices according to her tonnage.

Penalty for deficiency of apprentices.

XXXII. And be it further enacted, That no apprentice bound or assigned pursuant to this act, nor any master or owner in respect of any such apprentice, shall be liable to the payment of any contribution towards the support of any hospital or institution.

Apprentices exempt from contributions for hospitals.

XXXIII. And be it further enacted, That the said registrar in London and the collector and comptroller of the customs at each other port shall, in a book to be kept for that purpose, cause to be entered from time to time all such indentures and assignments of parish apprentices as aforesaid, specifying therein the dates thereof, the names and ages of the apprentices, the parishes or places from whence sent, the names and residences of the masters to whom bound or assigned, and the names, ports, and burthen of the respective ships to which such masters belong, and shall make and subscribe on each indenture or assignment respectively an indorsement purporting that the same hath been duly registered pursuant to this act; and every such collector and comptroller shall also at the end of each quarter of the year transmit a list of the indentures and assignments so registered by him within the preceding quarter, containing all the particulars aforesaid, to the said registrar, for the purposes of this act.

Indentures and assignments to be registered.

XXXIV. And be it further enacted, That in every case of a per- Indentures of

apprentices to be registered.

son voluntarily binding himself apprentice to the sea service, the indentures to be executed on such occasions shall be registered in a book to be kept for that purpose by the said registrar in London, and by the collector and comptroller of the customs at each other port at which the indenture shall be executed, in which book shall be expressed the dates of the several indentures, the names and ages of the apprentices, the names and residence of their masters, and (if known) the names, port, and burthen of the several ships on board which they are respectively to serve; and such registrar and collector or comptroller respectively, shall indorse and subscribe upon each indenture a certificate purporting that the same hath been duly registered pursuant to this act, and the said collector and comptroller shall also at the end of each quarter of the year transmit a list of the indentures so registered by them within the preceding quarter, containing all the particulars aforesaid, to the said registrar for the purposes of this act; and that it shall be lawful for the master, or in case of his death his executor or administrator, with the consent of the apprentice if of the age of seventeen years or upwards, and if under that age, with the consent of his parent or guardian, to assign or transfer the indenture of any such apprentice to any other person who may be the master or owner of any registered ship; and all such voluntary apprentices may, during the term for which they shall be bound, be employed in any ship of which the master of any such apprentice may be the master or owner: Provided always, that every such assignment shall be registered and indorsed by the said registrar, or by the collector or comptroller of the customs at the port where the master shall be resident, or to which his ship shall belong, in which latter case the said collector or comptroller shall notify the same to the said registrar as is hereinbefore provided with regard to the indenture of such apprentice.

Assignments to be registered.

Agreement and indentures of apprentice exempt from stamp duty.

XXXV. And be it further enacted, That all agreements with the crew of a ship made in pursuance of and in conformity with this act, and all indentures of parish and voluntary apprentices to the sea service, and all counterparts and assignments of such indentures to be respectively executed after the passing of this act, shall be wholly exempt from stamp duty.

Penalty on master's neglecting to register indentures; and for suffering apprentices to quit their service.

XXXVI. And be it further enacted, That if any master to whom any apprentice mentioned in this act shall be bound or assigned shall neglect to cause the indenture or the assignment thereof (as the case may be) to be registered as required by this act, or shall, after the ship shall have cleared outwards on the voyage upon which such ship may be bound, suffer his apprentice to quit his service (not entering into that of his Majesty), except in case of death, desertion, sickness, or other unavoidable cause, to be certified in the log-book of the ship, every such master shall for every such offence forfeit and pay the sum of ten pounds.

Justices to determine complaints.

XXXVII. And be it further enacted, That any two or more justices of the peace residing at or near any port at which any ship as aforesaid, having on board thereof any sea apprentice, shall at any time arrive, shall have full power and authority to inquire into and examine, hear and determine all claims of apprentices upon their masters under their indentures, and all complaints of hard or ill-

usage exercised by their respective masters towards any such their apprentices, or of misbehaviour on the part of any such apprentice, and to make such orders therein as they are empowered by law to do in other cases between masters and apprentices.

XXXVIII. And whereas by an act passed in the ninth year of the reign of his late Majesty king George the Fourth, for consolidating and amending the statutes in England relative to offences against the person, a summary jurisdiction is provided for the punishment of persons guilty of common assaults and batteries : And whereas it is expedient that the provisions of the said act should be extended to similar offences committed on board merchant ships as hereinafter provided ; be it therefore further enacted, That in the case of any assault or battery which shall after the commencement of this act be committed on board any merchant ship belonging to any subject of the United Kingdom in any place at sea, or out of his Majesty's dominions, it shall be lawful for any two justices of the peace in any part of his Majesty's dominions, upon complaint of the party aggrieved, to hear and determine any such complaint, and to proceed and make such adjudication thereon as by the said act any two justices are empowered to do, subject however to such provisos and limitations as are contained in the said act with respect to the cases of assault and battery therein mentioned ; and the fine or forfeiture to be imposed in any such case shall be payable to the Merchant Seaman's Hospital or Institution at or nearest to the port or place where such adjudication shall be made.

Common assaults may be summarily punished by two justices.

XXXIX. And be it further enacted, That no parish or voluntary apprentice to the sea service shall be at liberty to enter into the naval service of his Majesty during the period of his apprenticeship without the consent of his master ; but if nevertheless he shall voluntarily enter on board any of his Majesty's ships of war, and shall be allowed by his master to continue therein, such master, in case he shall give notice to the secretary of the Admiralty of his consent to his apprentice remaining in his Majesty's service during the residue of the term of his apprenticeship, shall, upon the production of his indenture, be entitled, at the time of paying off the ship, to receive to his own use any balance of wages that may be then due and payable to any such apprentice up to the period of the expiration of his indenture.

Masters entitled to receive the wages of apprentices entering into the navy.

XI. And whereas great mischiefs have arisen from masters of merchant ships leaving seamen in foreign parts, who have been thus reduced to distress, and thereby tempted to become pirates, or otherwise misconduct themselves, and it is expedient to amend and enlarge the law in this behalf ; be it therefore further enacted, that if any master of a ship belonging to any subject of the United Kingdom shall force on shore and leave behind, or shall otherwise wilfully and wrongfully leave behind on shore or at sea, in any place in or out of his Majesty's dominions, any person belonging to his crew, before the return to or arrival of such ship in the United Kingdom, or before the completion of the voyage or voyages for which such person shall have been engaged, whether such person shall have formed part of the original crew or not, every person so offending

Forcing on shore or leaving behind any person belonging to the crew deemed a misdemeanor.

Jurisdiction of
courts for
trying such
misdemeanors.

shall be deemed guilty of a misdemeanor, and shall suffer such punishment by fine or imprisonment or both as to the court before which he shall be convicted shall seem meet; and the said offence may be prosecuted by information at the suit of the attorney-general on behalf of his Majesty, or by indictment or other proceeding in any court having criminal jurisdiction in his Majesty's dominions at home or abroad, where such master or other person as aforesaid shall happen to be, although the place where the offence may be therein averred to have been committed (which averment is hereby required to be substantially according to the fact) shall appear to be out of the ordinary local jurisdiction of such court; and such court is hereby authorized to issue a commission or commissions for the examination of any witnesses who may be absent or out of the jurisdiction of the court; and at the trial the depositions taken under such commission or commissions, if such witnesses shall be then absent, shall be received in evidence.

Seamen not to
be discharged
abroad, without
sanction of one
of certain
functionaries.

XLJ. And be it further enacted, that no such master shall discharge any individual person of his crew, whether British subject or foreigner, at any of his Majesty's colonies or plantations, without the previous sanction in writing of the governor, lieutenant-governor, secretary, or other officer appointed in that behalf by the government there, or in the absence of all such authorities at or near to the port or place at which the ship shall be then lying, then of the chief officer of customs of such colony or plantation resident at or near to such port or place; nor shall he discharge any such person at any other place abroad without the like previous sanction in writing of his Majesty's minister, consul, or vice-consul there, or in the absence of any such functionary, then of two respectable merchants resident there; all which said functionaries respectively are hereby authorized and required, and all which said merchants are hereby authorized, in a summary way, to inquire into the grounds of any such proposed discharge by examination on oath, and thereupon to grant or refuse such sanction according to their discretion, having regard to the objects of this act.

Nor to be left
abroad on the
plea of inca-
pacity to pro-
ceed, desertion,
or disappear-
ance, without a
similar au-
thority.

XLII. And be it further enacted, that no such master shall be at liberty to leave behind at any place abroad, either on shore or at sea, any person of his crew as aforesaid, on the plea of such person not being in a condition to proceed on the voyage, or having deserted from the ship, or otherwise disappeared, unless upon a previous certificate in writing of one of such functionaries or merchants as aforesaid, if there be any such at or within a reasonable distance from the place where the ship shall then be, if there be time to procure the same, certifying that such person is not in such condition, or has deserted or disappeared, and cannot be brought back; and all such functionaries as aforesaid are hereby authorized and required, on the application of any such master, to inquire by examination on oath into the circumstances, and to give or refuse such certificate according to the result of such examination.

If any of the
crew are left
behind, the

XLIII. And be it further enacted, that if any such master shall leave behind any one of his crew as aforesaid contrary to this act, in any indictment or proceeding the proof of his having obtained

such sanction or certificate as aforesaid shall be upon him, it being the intention hereof that, except in the case of entering into his Majesty's naval service, no person of the crew shall be discharged, either with or without his consent, in any place abroad where such functionary can be found, unless he shall have given such sanction thereto.

proof of sanction or authority shall be upon the master.

XLIV. And be it further enacted, that every such master who shall leave any person of his crew as aforesaid on shore at any place abroad, under a certificate of his not being in a condition to proceed on the voyage, shall deliver to one of the said functionaries, or if there be none such to any two respectable merchants there, or if there be but one then to such one merchant, a just and true account of the wages due to such person, and pay the same to the seaman either in money or by a bill drawn upon the owner of his ship; and if by bill, then such functionary or merchant, according to the case, is hereby authorized and required by certificate indorsed on such bill to testify that the same is drawn according to this act for money due on account of wages of a seaman, or to that effect; and any such master who shall deliver a false account, or refuse or neglect to deliver a just and true account of the wages due to such person, and to pay the amount thereof in money or by bill as aforesaid, shall for every such offence forfeit and pay, in addition to the wages due, the penal sum of twenty-five pounds.

Seamen when allowed to be left behind to be paid their wages.

XLV. Provided always, and be it further enacted, that nothing in this act or in any agreement contained shall be deemed to extend to prevent any seaman or person belonging to any merchant ship whatever from entering or being received into the naval service of his Majesty, nor shall any such entry be deemed a desertion from the merchant ship, nor incur any penalty or forfeiture whatever, either of wages, clothes, or effects, or other matter or thing, notwithstanding any agreement made to the contrary hereof; and all masters and owners of ships are strictly prohibited from introducing into any ship's articles or agreement with the crew any clause or matter by which any penalty or forfeiture of any kind is agreed to be incurred by a seaman upon his entry into his Majesty's service.

Act not to extend to prevent seamen from entering into the navy.

XLVI. And be it further enacted, that when any seaman shall quit a merchant ship in order to enter into his Majesty's naval service, and shall thereupon be actually received into such service, not having previously committed any act amounting to and treated by the master as a total desertion, he shall be entitled immediately upon such entry to the delivery up of all his clothes and effects on board such merchant ship, and (in case the ship shall have earned freight) to receive from the master the payment of the proportionate amount of his wages up to the period of such entry, either in money or by a bill on the owner thereof; all which clothes, effects, money, and bill, such master is hereby required to deliver up to him accordingly, under a penalty of twenty-five pounds for any refusal or neglect, to be recovered, with full costs of suit, by such seaman: provided always, that if no freight shall have been earned at the time of such entry, then the master shall, and he is hereby required to give the seaman so entering a bill upon the owner for his wages to the period

Upon entry of seamen into the navy from merchant ships they shall be entitled to the immediate delivery up of their clothes and payment of any wages that may be due.

of such entry, payable on the ship's safe arrival at her destined port ; but in case the master shall have no means of ascertaining the balance justly due he shall make out and deliver to such seaman a certificate of the period of his services and the rate of wages he is entitled to, producing at the same time to the commanding or other officer of his Majesty's ship the agreement entered into with the seaman for the voyage ; and every such master, upon the delivery up of such clothes and effects and the settlement of such wages in manner herein mentioned, shall be entitled to receive from the officer in command of the ship of his Majesty into which such seaman shall have entered a certificate signed by the said officer, which such officer is hereby required to give upon the request of the master, testifying that such seaman has entered into such ship of his Majesty to serve, as proof that the master had not parted with the seaman contrary to the provisions of this act.

Power to his Majesty to sue for the amount advanced for the relief of seamen left abroad.

XI.VII. And be it further enacted, that in all cases where any master shall have forced on shore or left behind any person against the provisions of this act, and such person shall become distressed and be relieved under the provisions of an act passed in the eleventh year of the reign of his late Majesty king George the Fourth, for amending and consolidating the laws relating to the pay of the Royal Navy, or under any act hereafter to be passed, then, in addition to the wages due from and the penalties imposed on such master, his Majesty shall be entitled to sue such master or the owner of the ship, at the option of the commissioners for executing the office of lord high admiral of the United Kingdom, for all the charges and expenses which shall have been incurred on the subsistence, necessary clothing, and conveyance home of any such person, as so much money paid, laid out, and expended to the use of the defendant, which, together with full costs of suit, may be recovered in the same manner as other debts due to his Majesty are recoverable in any court having jurisdiction in cases of debts due to the crown ; and in any proceeding for that purpose proof of the account furnished to the said commissioners by any one of such functionaries, or by such two merchants or one merchant, according to the case, as provided by the said act of the eleventh year of king George the Fourth, shall, together with proof of payment by the said commissioners or by the treasurer of the Navy of the charges incurred on account of any such person, be sufficient evidence that such person was relieved and conveyed home, according to the intent of the said act, at his Majesty's expense ; and the court in which any proceeding for the recovery of the said money shall be instituted is hereby authorized to issue a commission or commissions for the examination of witnesses abroad, and the depositions taken under such commission or commissions shall be received as evidence.

Ship's agreement on arrival at a foreign port to be deposited with the consul.

XLVIII. And in order the more effectually to secure a compliance with the provisions of this act, be it further enacted, That every master of a ship belonging to any subject of his Majesty, on his arrival at any foreign port where there shall be a British consul or vice-consul, shall deliver to such consul or vice-consul the agreement with his ship's crew, to be by such consul or vice-consul preserved

during the ship's stay there, and to be returned to the master before his leaving the port, without any fee or charge being made for the same : and if any such master shall refuse or neglect to deliver any such agreement to the consul or vice-consul, as is hereby required, he shall for every such offence forfeit and pay the sum of twenty-five pounds.

Penalty for neglect.

XLIX. And be it also enacted, That during the ship's stay at any such foreign port no seaman shall be shipped by any such master except with the privity of such consul or vice-consul, to be indorsed or certified on the agreement, under a penalty of twenty-five pounds to be forfeited by any such master for every seaman who shall be so shipped in breach of this act.

No seaman to be shipped at a foreign port without the privity of the consul.

L. And be it further enacted, That the master of every ship belonging to any subject of his Majesty as aforesaid shall, and he is hereby required to produce and show the muster-roll of the ship, and the agreement with his crew to the captain, commander, or other commissioned officer of any of his Majesty's ships requiring a production and sight thereof ; and that it shall be lawful for any such officer in his Majesty's naval service, if he shall think it necessary so to do, to muster the crew and passengers (if any) of any ship belonging to any subject as aforesaid, in order to be satisfied that the provisions of this act and of any other act by which the crews of merchant ships are regulated, and the laws relating to navigation with respect to the crews of merchant ships, have been duly complied with ; and if any such master shall, upon being required so to do by any such officer, neglect or refuse to produce such muster-roll or such agreement, or shall obstruct any such officer in the execution of his duty in mustering the said crew or passengers, or shall produce any false muster-roll, he shall for every such offence forfeit and pay the sum of twenty-five pounds.

Masters to produce agreements to officers of King's ships.

LI. And be it further enacted, that for the better carrying into effect the purposes of this act it shall be lawful for the said registrar and his assistants, and also for the respective collectors or other chief officers of the customs, at the several ports of the United Kingdom and of the British possessions abroad, to demand from the master of every ship hereby required to enter into an agreement with his crew the production of the muster roll of the ship and also of such agreement, with liberty to take a copy of either or both, and to muster the crew and apprentices of such ship, for the purpose of ascertaining whether the provisions of this act and of the laws relating to navigation have been complied with : and if any such master, on such demand being made, shall refuse or neglect to produce such muster roll or agreement, or shall refuse to allow a copy of either document to be taken, or shall refuse to permit or shall prevent his crew and apprentices from being so mustered, he shall for every such neglect, refusal, or offence forfeit and pay the sum of fifty pounds.

Registrar and officers of customs empowered to require production of the agreement and muster roll.

LII. And to avoid doubts in the construction of this act, be it further enacted, that every person having the charge or command of any ship belonging to any subject of the United Kingdom shall,

Definition of the terms master, seaman, ship, and owner

within the meaning and for the purposes of this act, be deemed and taken to be the master of such ship; and that every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board the same, shall in like manner be deemed and taken to be a seaman within the meaning and for the purposes of this act: and that the term "ship," as used in this act, shall be taken and understood to comprehend every description of vessel navigating on the sea; and that the term "owner," as applied to a ship, shall be understood to comprehend all the several persons, if more than one, to whom the ship shall belong; and that all steam and other vessels employed in carrying passengers or goods shall be deemed trading ships within the meaning and for the purposes of this act.

Recovery of penalties.

LIII. And be it further enacted, that all penalties and forfeitures imposed by this act, and for the recovery whereof no specific mode is herein-before provided, shall and may be recovered, with costs of suit, in manner following; (that is to say,) all penalties and forfeitures not exceeding twenty pounds shall be recoverable at the suit of any person by information and summary proceeding before any one or more justice or justices of the peace in any part of his Majesty's dominions, residing near to the place where the offence shall be committed or where the offender shall be, which justice or justices shall have full power to levy the amount of any such penalty or forfeiture and costs by distress and sale of the offender's goods, or by commitment of the offender for nonpayment of the amount; and all penalties and forfeitures exceeding twenty pounds shall and may be recovered, with costs of suit, in any of his Majesty's Courts of Record at Westminster, Edinburgh, or Dublin, or in the colonies at the suit of his Majesty's attorney-general or other chief law officer of the crown in any part of his Majesty's dominions other than in Scotland, and if in Scotland at the suit of the lord advocate; and that all penalties and forfeitures mentioned in this act for which no specific application is herein-before provided shall, when recovered, be paid and applied in manner following; (that is to say,) one moiety of every such penalty shall be paid to the informer or person upon whose discovery or information the same shall be recovered, and the residue shall be divided between Greenwich Hospital and the merchant seamen's hospital or institution at the port to which the ship shall belong, and if there shall be none such at the said port, then the whole of the said residue shall be paid to Greenwich Hospital: provided always, that it shall be lawful for the court before which or the justice or justices before whom any proceedings shall be instituted for the recovery of any pecuniary penalty imposed by this act to mitigate or reduce such penalty as to such court or justices respectively shall appear just and reasonable, in such manner, however, that no such penalty shall be reduced below one-half of its original amount: and provided also, that all proceedings so to be instituted shall be commenced within two years next after the commission of the offence, if the same shall have been committed at or beyond the Cape of Good Hope or Cape Horn, or within one year if committed on the European side of those limits, or within six calen-

Application of forfeitures.

dar months after the return of the offender or the complaining party to the United Kingdom.

LIV. Provided always, and be it further enacted, that this act shall not extend or apply to any ship registered in or belonging to any British colony having a legislative assembly, or to the crew of any such ship, while such ship shall be within the precincts of such colony ; any thing herein-before contained to the contrary in anywise notwithstanding.

As to ships
belonging to
any British
Colony
having a
legislature.

LV. And be it further enacted, that this act may be amended, altered, or repealed by any act or acts to be passed during the present session of parliament.

Act may be
amended
during this
session.

SCHEDULE (A.)

AN AGREEMENT made, pursuant to the Directions of an Act of Parliament passed in the Sixth Year of the Reign of His Majesty King William the Fourth, between
 of the Burthen of
 the Master of the Ship
 of the Port of
 Tons, and the several Persons whose names are subscribed hereto.

It is agreed by and on the part of the said persons, and they severally hereby engage, to serve on board the said ship in the several capacities against their respective names expressed, on a voyage from the port of _____ to _____ [here the intended voyage is to be described as nearly as can be done, and the places at which it is to be performed, and back to the port of _____] and the said crew further engage to conduct themselves in an orderly, faithful, honest, careful, and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in everything relating to the said ship, and the materials, stores, and cargo thereof, whether on board said ship, in boats or on shore [here may be inserted any other clauses which the parties may think proper to be introduced into the agreement, provided that the same be not contrary to or inconsistent with the provisions and spirit of this act.] In consideration of which services to be duly, honestly, carefully, and faithfully performed, the said master doth hereby promise and agree to pay to the said crew, by way of compensation or wages, the amount against their names respectively expressed. In witness whereof the said parties have hereto subscribed their names on the days against their respective signatures mentioned.

[illegible]

Note.—Any embezzlement or wilful or negligent loss or destruction of any part of the ship's cargo or stores may be made good to the owner out of the wages (so far as they will extend) of the seamen guilty of the same; and if any seaman shall enter himself as qualified for a duty to which he shall prove to be not competent, he will be subject to a reduction of the rate of wages hereby agreed for in proportion to his incompetency.

An Agreement made, pursuant to the Directions of an Act of Parliament passed in the Sixth Year of the Reign of his Majesty King William the Fourth, between the Master of the Ship and of the Burthen of several Persons whose Names are subscribed hereto.

It is agreed by and on the part of the said persons, and they severally hereby engage, to serve on board the said ship in the said several capacities against their respective names expressed, which ship is to be employed in *[here the nature of the ship's employment is to be described, whether in the fisheries, on the coast, or in trading from one part of the United Kingdom to another, or to any of the islands of Jersey, Guernsey, Alderney, Sark, and Man, or to any port on the continent of Europe between the river Elbe inclusive and Brest]*; and the said crew further engage to conduct themselves in an orderly, faithful, honest, careful, and sober manner, and to be at all times diligent in their respective duties and stations, and to be obedient to the lawful commands of the master in everything relating to the said ship, and the materials, stores, and cargo thereof, whether on board such ship, in boats, or on shore *[here may be inserted any other clauses which the parties may think proper to be introduced into the agreement, provided that the same be not contrary to, or inconsistent with, the provisions and spirit of this act]*. In consideration of which services, to be duly, honestly, carefully, and faithfully performed, the said master doth hereby promise to pay to the said crew, by way of compensation or wages, the amount against their names respectively expressed: provided always, and it is hereby declared, that no seaman shall be entitled to his discharge from the ship during any voyage in which she may be engaged, nor at any other than a port in the United Kingdom. In witness whereof the said parties have hereto subscribed their names on the days against their respective signatures mentioned.

[illegible]

Note.—Any embezzlement or wilful or negligent loss or destruction of any part of the ship's cargo or stores may be made good to the owner out of the wages (so far as they will extend) of the seaman guilty of the same; and if any seaman shall enter himself as qualified for a duty to which he shall prove to be not competent, he will be subject to a reduction of the rate of wages hereby agreed for in proportion to his incompetency.

SCHEDULE (C).

Ship of the port of whereof was master.
 A List of the crew (including the master and apprentices) at the period of her sailing from the port of and of the men who
 in the United Kingdom, from which she took her first departure on her voyage to being her port of
 joined the ship subsequent to such departure and until her return to the port of
 destination in the United Kingdom.

Name.	Age.	Place of birth.	Quality.	Ship in which he last served.	Date of joining the ship.	Place where.	Time of death or leaving the ship.	Place where.	How disposed of.

Note.—If any one of the crew has entered his Majesty's service, the name of the king's ship in which he entered, must be stated in the account under the head of "How disposed of."
Note.—This list, to be filled up, and being signed by the master, is to be delivered by him to the collector or comptroller of the customs, on reporting his ship inwards, on her arrival at her port of destination in the United Kingdom.

An account of the voyages in which the ship
on the . . . day of . . . one thousand eight hundred and . . .
one thousand eight hundred and . . . and of all the persons (master and apprentices included) who have
belonged to such ship during that period.

ACCOUNT OF THE VOYAGES.

[Here the several voyages and the periods of such voyages are to be described.]

ACCOUNT OF THE CREW.

[illegible]

Note — If any one of the crew shall have entered his Majesty's service, the name of the King's ship in which he entered must be stated in this account under the head of "How disposed of."

Note.—This account, when filled up, is to be signed by the owner, and deposited with the collector or comptroller of the customs of the port to which the ship shall belong, or with the registrar or merchant seamen in London.

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